Supreme Court, U. S.
FILED
MAY 2 1978
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1571

STATE OF DELAWARE,

Petitioner,

v.

WILLIAM J. PROUSE, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

RICHARD R. WIER, JR.
Attorney General

CHARLES M. OBERLY, III
State Prosecutor

M. P. SHAFRAN
FRED S. SILVERMAN
Deputy Attorneys General
Department of Justice
Wilmington State Building
Wilmington, Delaware 19801

Counsel for Petitioner

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No.

STATE OF DELAWARE,

Petitioner,

V.

WILLIAM J. PROUSE, III,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Delaware entered in the above-captioned case on February 1, 1978.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware, which has not yet been reported, is Appendix A, attached hereto. The opinion of the Superior Court of the State of Delaware, also unreported, is Appendix B, attached hereto.

JURISDICTION

The judgment of the Delaware Supreme Court was entered February 1, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Four:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Fourteen, Section One:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

STATUTE INVOLVED

The section of Delaware's Uniform Controlled Substances Act, involved here, 16 DEL. C. §4754, is Appendix C attached hereto.

QUESTION PRESENTED

Are the Fourth and Fourteenth Amendments to the United States Constitution violated if police officers randomly stop motorists for the purpose of conducting driver's license and vehicle registration checks?

STATEMENT OF THE CASE

During the evening of November 30, 1976, Patrolman Anthony Avena of the New Castle County Police Department was on road patrol. At approximately 7:20 p.m. Patrolman Avena stopped an automobile being operated by Respondent, William J. Prouse, III. Prior to stopping Respondent's vehicle, the officer had observed no traffic or equipment violations nor any unusual or suspicious activity. Respondent was stopped for a spot-check of his license and registration.

After stopping Respondent's vehicle, Patrolman Avena approached it on foot. As he got to the back of the vehicle, he observed that its window was partly open and he detected the smell of marijuana coming from the vehicle. The officer then asked Respondent and the vehicle's other occupants to step outside. As they complied with his request, the officer observed a cellophane bag protruding from underneath the front seat. The bag, upon closer inspection, was found to contain green plant-like material.

The officer then searched the persons of the occupants of the vehicle. During this search marijuana was discovered in Respondent's pocket. As a result of the officer's discovery, Respondent was indicted for Possession of a Non-Narcotic Schedule I Substance in violation of 16 DEL. C. §4754, (App.C). Respondent moved in the Delaware Superior Court for an order suppressing the

evidence against him on the ground that it had been obtained during an illegal detention. After an evidentiary hearing, the Superior Court granted Respondent's motion.

Petitioner appealed to the Supreme Court of the State of Delaware pursuant to 10 DEL. C.§9902(b) (c), (App. A-2). In affirming the Superior Court ruling, the Delaware Supreme Court held:

> ". . . [a] random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occured is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution. It follows that a random stop solely for the purpose of a documents check is an unreasonable and unconstitutional detention of those in the stopped vehicle."

The facts of this case have never been in dispute and they are set out in greater detail in the opinions below. (App. A, B).

REASONS FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A NEW AND IMPORTANT QUESTION OF FEDERAL LAW.

The Supreme Court of Delaware, while recognizing the state interest in enforcing driver licensing and vehicle registration laws, denied the police the use of the most effective method for enforcing those laws–the random stopping of motorists. If allowed to stand, the Delaware decision will adversely affect law-enforcement in Delaware, and perhaps elsewhere, on a day-to-day basis.

The significance of the decision below is not limited to a single defendant nor even to a single state. Every state in the Union licenses the drivers who use its roads. Motor vehicle registration is likewise universal. The question of the validity of random stops, which is presented here in a simple and uncontrived manner, is, therefore, of concern to all of the states.

The facts of this case highlight another significant aspect of random stops. Pursuant to the stop of Respondent for a documents check, evidence of the commission of a crime was seized. Because the Delaware Courts felt constrained by the Fourth Amendment, the evidence was suppressed under *Mapp v. Ohio*, 367 U.S. 643 (1961).

If the confusion and inconsistency which is developing as each jurisdiction is called upon to interpret the Federal Constitution (see *infra*), is to be limited, it is respectfully submitted that this Court must provide its definitive guidance in this case.

II. THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL AND STATE COURT DECISIONS.

Although Delaware's interpretation of the Fourth Amendment, *inter alia*, follows *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973) and *People v. Ingle*, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E.2d 39 (1975) and is in accord with the views of the District of Columbia Circuit Court of Appeals, *United States v. Montgomery*, 561 F.2d 875 (D.C. Cir. 1977) and the Eighth Circuit Court of Appeals, *United States v. Nicholas*, 448 F.2d 622 (8th Cir. 1971), all of those cases are directly in conflict with the decision of the Tenth Circuit Court of Appeals in *United States v.*

Jenkins, 528 F.2d 713 (10th Cir. 1975), the Ninth Circuit Court of Appeals in *Lipton v. United States*, 348 F.2d 591 (9th Cir. 1975), and the Fifth Circuit Court of Appeals in *Myricks v. United States*, 307 F.2d 901 (5th Cir.), *cert. dismissed*, 368 U.S. 1015 (1967). Moreover, the Delaware decision is contrary to the state court decisions in *State v. Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975), *State v. Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973), and *Leonard v. State*, 496 S.W.2d 576 (Tex. Crim. App. 1973).

At the heart of the growing discord among the state and federal courts is the question of the proper interpretation of the Fourth Amendment. As noted above, this conflict will grow until this Court rules whether random stops are constitutionally permissible.

III. THE DECISION BELOW IS INCORRECT.

In *United States v. Brigoni-Ponce*, 422 U.S. 873, 883 n.8 (1975), this Court expressly declined to rule that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding driver's licenses and vehicle registration. There is a long history evidencing the utility of license and registration checks and such checks are routinely "accepted by motorists as incident to highway use." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 n.14 (1976). The Delaware Supreme Court in this case recognized the legitimate state interest in enforcing licensing and registration laws. (App. A-9). Nevertheless, it went on to adopt what it called "a rigid invalidity rule." (App. A-10).

This Court has never created rigid rules for analyzing governmental conduct under the Fourth Amendment.

Instead, as the Delaware Supreme Court recognized, the watchword in such analysis is "reasonableness." (App. A-6). The standard for judging the reasonableness of an official detention is found in *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* calls for a balancing of the governmental need for an intrusion against the actual impact of the intrusion on the citizen's personal security.

Terry involved ". . . a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment . . ." *Terry*, *supra* at 17. The intrusion there was reasonable, however, when balanced against the risk to the police officer and others in the area. By comparison, this case involves detentions which are slight and acceptable to those detained. *Martinez-Fuerte*, *supra*. Respondent was not even ordered out of his vehicle until after the officer observed evidence of a crime in progress.

In this case, the Delaware Supreme Court did not analyze the impact of the intrusion it mechanically forbade. Instead, the Court focused on the mere possibility that a random stop, in some other case, might be discriminatory. No discrimination was evident here. The theoretical potential for discrimination in the application of the random stop does not justify prohibiting its use where no discrimination is actually demonstrated. This is especially true where, as here, a distinction is drawn between random and systematic stops. The systematic stop clearly causes greater inconvenience to the motorist who must wait at a roadblock. Moreover, the location of the roadblock itself may be the product of a discriminatory motive.

When the state interest in making certain that only licensed drivers and registered vehicles are at large on its

roads is balanced against the minimal inconvenience random stops cause innocent citizens, it is clear that such stops are constitutionally permissible. The decision of the Supreme Court of the State of Delaware, being to the contrary, is incorrect.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RICHARD R. WIER, JR.
CHARLES M. OBERLY, III
M. P. SHAFRAN
FRED S. SILVERMAN
Counsel for Petitioner

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,	§	
	§	
Plaintiff Below,	§	
Appellant,	§	
	§	
v.	§	No. 102, 1977
	§	
WILLIAM J. PROUSE, III,	§	
	§	
Defendant Below,	§	
Appellee.	§	

Submitted: December 13, 1977
Decided: January 30, 1978

Before HERRMANN, Chief Justice, DUFFY and McNEILLY, Justices.

Upon appeal from Superior Court. Affirmed.

Gregg E. Wilson, Deputy Attorney General, Wilmington, for plaintiff below, appellant.

David M. Lukoff, Assistant Public Defender, Wilmington, for defendant below, appellee.

McNEILLY, Justice

APPENDIX A

The State of Delaware appeals, pursuant to 10 Del.C. § 9902(b) and (c),* a Superior Court order which granted defendant's motion to suppress evidence. The challenged evidence was obtained by police during a random stop of defendant's automobile, and the issue raised is whether the police may arbitrarily stop and detain persons operating motor vehicles when the officers involved have no reasonable suspicion that the occupants of the stopped vehicle have or will violate the law. Because we are of the opinion that non-systematic stops by police, who have no reasonable suspicion that a legal violation has occurred, violate Federal and State constitutional guarantees, we affirm the Superior Court order and dismiss this appeal.

I.

While on routine patrol Officer Anthony Avena of the New Castle County Police stopped an automobile operated by defendant-Prouse to conduct a driver's license and vehicle re-

* 10 Del.C. § 9902(b) and (c) read as follows:

§ 9902. Appeal as of right.

(b) When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential. Upon ordering the complaint, indictment or information or any count thereof dismissed pursuant to the Attorney General's certification, the reasons of the dismissal shall be set forth in the order entered upon the record.

(c) The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the defendant may be subjected to trial. (10 Del.C. 1953, § 9902; 57 Del. Laws, c.133; 58 Del. Laws, c. 412, § 1.)

gistration check. Prior to the stop the officer observed no traffic or equipment violations, and had no indication that any criminal activity had been or would be perpetrated by defendant or the other occupants of his car. Officer Avena candidly testified that defendant's car was randomly chosen from other vehicles on the road to be the subject of a license and registration check, and that he regularly made similar routine stops of motor vehicles when not answering complaints. As the officer approached defendant's automobile he smelled the aroma of marijuana emanating from the car. While observing the occupants of the car step out into the street, Officer Avena noticed a cellophane bag containing leafy vegetable matter protruding from under the front seat. Suspecting that it contained marijuana, Officer Avena seized the bag and, thereafter, placed defendant under arrest. Subsequently, defendant was indicted for possession of a non-narcotic Schedule I substance in violation of 16 Del.C. § 4754.*

* 16 Del.C. § 4754 reads as follows:

§ 4754. Prohibited acts D; penalties.

It is unlawful for any person knowingly or intentionally to possess, use or consume any controlled substance or counterfeit substance classified in Schedule I, II, III, IV or V not a narcotic drug unless the substance was obtained directly from or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or except as otherwise authorized by this chapter. Any person who violates this section upon conviction shall be fined not more than $500 and imprisoned not more than 2 years. (16 Del.C. 1953, § 4754; 58 Del. Laws, c. 424, § 1.)

Defendant moved in Superior Court for an order suppressing the evidence against him on the ground that it had been obtained during an illegal detention. After an evidentiary hearing the Superior Court granted defendant's motion. The State concedes that defendant was detained in circumstances where the investigating officer had no reasonable suspicion that any criminal activity or motor vehicle violation had or would take place. However, the State asserts that the practice of randomly stopping motor vehicles for license and registration examinations is both constitutionally permissible, and necessary to properly enforce motor vehicle regulations.

The issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is not now before the Court. Systematic stopping procedures entail limited exercise of discretion concerning which vehicles to stop, and, therefore, pose legal issues different in nature from those presented by the random stop practice challenged here. We now focus on the competing State and individual interests which must be examined in order to determine the validity of random stopping procedures.

II

The Fourth Amendment to the United States Constitution provides;

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The constitutional proscription against unreasonable searches and seizures is made applicable to the States by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Mapp v. Ohio, 367 U.S. 643 (1961); United States ex rel. Dyton v. Ellingsworth, 306 F.Supp. 231 (D.Del. 1969). The Delaware Constitution Article I, § 6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former. State v. Moore, Del. Super., 187 A.2d 807 (1963). Evidence seized in disregard of these constitutional provisions is inadmissible at the trial of the person whose rights have been violated. Mapp v. Ohio, supra; Schaffer v. State, Del. Supr., 184 A.2d 689 (1962).

The precise legal issue raised in this appeal is whether the stop of defendant's automobile was an unconstitutional seizure within the meaning of the Fourth and Fourteenth Amendments. While a temporary stop or detention of a motor vehicle and its occupants is not normally described as a seizure, the Fourth Amendment has been construed to protect against unreasonable governmental intrusions into the privacy of the individual, regardless of whether they are labeled stops, detentions, frisks or seizures. Terry v. Ohio, 392 U.S. 1 (1968); Sibron v. New York, 392 U.S. 40 (1968). Therefore, since the police action here entailed an interference with defendant's right to free access to public highways, it is an official intrusion which must be examined to see if it accords with Fourth Amendment

requirements. If the police acted unreasonably then the evidence gathered as a result of their activities must be suppressed. Schaffer v. State, supra.

A search or seizure pursuant to a duly issued warrant is presumptively valid because a determination of the reasonableness of the intended action is made prior to its inception by a neutral Magistrate. Johnson v. United States, 333 U.S. 10 (1948); Saienni v. State, Del. Supr., 346 A.2d 152 (1975). There are instances in which a warrant is unnecessary for a legitimate search and seizure due to circumstances which make a warrantless search reasonable. See Carroll v. United States, 267 U.S. 132 (1925). Included within the warrant exception are cases where law officers have probable cause to believe that an automobile, or other readily moveable vehicle, is carrying contraband, is being driven in violation of the motor vehicle laws, or the occupants are or have been committing criminal violations. Carroll v. United States, supra; Freeman v. State, Del. Supr., 317 A.2d 540 (1974). Where a legal arrest has been made, a police officer may search the arrested person without a warrant. Ker v. California, 374 U.S. 23 (1963); Lido Social Club v. State, Del. Super., 86 A.2d 859 (1952). A protective frisk of one suspected of criminal activity may also be conducted by police. Terry v. Ohio, supra. The essential element necessary for a permissible governmental intrusion is reasonableness, with a constitutionally mandated

preference for warrants absent exceptional circumstances. Johnson v. United States, supra.

Because an automobile was the subject of the stop in the case at bar, we may invoke the Carroll exception to eliminate any warrant requirement. However, absent here is the element of probable cause which was essential to the reasonableness and legitimacy of the search and seizure in Carroll. As the Court said in Carroll:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise. Carroll v. United States, supra at 153, 154..

We note that the Carroll decision has been cited with approval by the Supreme Court of the United States as recently as 1977. See United States v. Ramsey, __ U.S. __, 97 S.Ct. 1972 (1977).

The search and seizure of defendant's vehicle must be justified, if at all, on grounds other than a finding that the investigating officer had probable cause to make the stop, since the State agrees that he did not. The critical question is

whether there are any legitimizing factors present here which would justify the police action. The United States Supreme Court has set forth the following standard for judging the reasonableness of an official search or seizure:

> [I]t is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen, for there is no ready test for balancing the need to search [or seize] against the invasion which the search [or seizure] entails. Terry v. Ohio, supra at 20, 21.

The State seeks to justify the initial detention of defendant* on the ground that a documents check is a reasonable form of limited detention of those operating motor vehicles on State highways. The State points to the inherent danger involved in the operation of motor vehicles, as evidenced by the large number of traffic related injuries which occur in this State and the United States generally, and concludes that the State has a substantial interest in regulating the use of the highways, and enforcing its licensing and vehicle registration laws. The State contends that the most effective method of enforcing its licensing and registration laws is to randomly stop motorists to check compliance with those laws. The State completes its argument by asserting that because they are

* We assume, as all counsel involved herein have, that if the initial detention of defendant was constitutional, all subsequent police acts were also since the marijuana was in the "plain view " of Officer Avena and as contraband it was subject to immediate seizure. Ker v. California, supra; Miller v. State, Del. Supr., 310 A.2d 867 (1973).

necessary to further a legitimate State interest, random vehicle stops for the limited purpose of conducting a documents check are reasonable and constitutional even in the absence of probable cause.

We rule that before the government may single out an automobile to stop it, there must exist specific facts justifying the intrusion. Conversely, a random stop in the absence of specific justifying facts is unreasonable and unconstitutional. See Commonwealth v. Swanger, Pa. Supr., 307 A.2d 875 (1973), and People v. Ingle, N.Y. Ct. App., 369 N.Y.S.2d 67 (1975). We recognize the legitimate state interest in enforcing licensing and registration laws, and note that in fact situations similar to that of the present case other courts have reached the conclusion that the state interests outweigh the interests of the individual. See State v. Holmberg, Neb. Supr., 231 N.W.2d 672 (1975), and State v. Williams, S.C. Supr., 116 S.E.2d 858 (1960) However, the factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedure. The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possi-

bility of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures could be practiced with little or no chance for judicial review.

It has been asserted that a rigid invalidity rule as we adopt here is too broad, and that only where actual discriminatory intent is shown to have motivated the stopping officer, or where a license check is used as a pretext to investigate unrelated crime, should the random stop be illegal. See Palmore v. United States, D.C.Ct App., 290 A.2d 573 (1972). However, burdening a criminal defendant with the task of proving that a police officer acted with an illegal subjective intent would as a practical matter emasculate any limited rule concerning random stopping procedures, and in turn, emasculate Fourth Amendment rights.*

We hold, therefore, that a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution. It follows that a random stop solely for the purpose of a documents check is an unreasonable and unconstitutional detention of those in the stopped vehicle. Because the stop in the present case was arbitrary, and not based on

* For a thorough discussion of this important point See Note, Automobile License Checks and the Fourth Amendment, 60 Va. L.R. 666 (1974).

justifying facts, it was illegal, and the evidence gathered as a result of the stop must be excluded from defendant's trial. The Superior Court order granting defendant's motion to suppress was correct as a matter of law.

AFFIRMED.

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH T. WALSH
JUDGE

COURT HOUSE
WILMINGTON, DE. 19801

Gregg E. Wilson, Esq.
Deputy Attorney General
The Wilmington Tower
Wilmington, Delaware 19801

David M. Lukoff, Esq.
Assistant Public Defender
200 Odd Fellows Building
Wilmington, Delaware 19801

RE: State v. William J. Prouse
I76-12-0213

Submitted: March 4, 1977
Decided: March 10, 1977

Gentlemen:

Defendant, charged with Possession of Marijuana, has moved to suppress the evidence against him on the ground that the seizure of the contraband arose from an unauthorized detention of him by the police. The Court conducted an evidential hearing at which the sole witness was the arresting police officer. After the filing of memoranda this is the Court's decision on the motion.

The arresting officer testified that on November 30, 1976, at approximately 7:20 p.m. while on routine parole he decided to stop a motor vehicle operated by the defendant for a routine driver's license and registration check. He testified that he observed no traffic violations; no motor vehicle equipment violations; no erratic or unusual driving and neither the lateness of the hour nor the location of the automobile gave him any suspicion that the driver or the occupants were engaged in improper activity. The officer testified that when he approached the automobile he smelled what appeared to him to be burning marijuana and upon asking the occupants to emerge from the car he saw a cellophane bag protruding from under the seat. This, in turn, led to the search of the persons of the occupants. Upon the defendant was found material which the State contends was marijuana.

The State concedes that there was no basis for the officer's stopping of this automobile other than his desire to conduct a

license and registration check on a random basis. Defendant contends that such a stop is a detention without cause and constitutionally improper.

The lawfulness of a seizure of evidence which stems from a detention for a routine license or registration check has been the comment of decisions in several jurisdictions. While the decisions are not uniform, the trend appears to be one of validating such seizures where the same are the product of systematic checks under objective standards. Thus, approval has been given to seizures resulting from road blocks on the theory that such monitoring is indiscriminate and not based on the whim or caprice of the police officer. Several decisions relied upon by the State involve seizures arising from road blocks and are thus clearly distinguishable. State v. Smolen, App. Div. Conn., 232 A.2d 330 (1967); City of Miami v. Aronovitz, Supr. Ct. Fla., 114 So.2d 784 (1959); State v. Severance, N.H. Supr., 237 A.2d 683 (1968). Equally distinguishable are those decisions in which the motivation for the stop was the lateness of the hour or suspicious activities or appearance of the driver or occupants. Glover v. State of Maryland, Md. App., 287 A.2d 333 (1972); State v. Braxton, N.J. Super., 268 A.2d 40 (1970); State v. Allen, N.C. Supr., 194 S.E.2d 9 (1973); State v. Williams, S.C. Supr., 116 S.E.2d 858 (1960). Two cases advanced by the State appear to sanction a non-systematic random stop for license checks. Palmore v. U. S., D.C. App., 290 A.2d 573 (1972); State v. Holmberg, Neb. Supr., 231 N.W.2d 672 (1975).

The New York Court of Appeals in People v. Ingle, N.Y. Ct. App., 369 N.Y.S.2d 67 (1975) reversed the conviction of a defendant from whom drugs were seized in a factual situation identical to that now under consideration. The Court pointed out that there must be some valid reason, however slight, for the singling out of a particular automobile and its operator for a stop and an inspection to determine compliance with the motor vehicle law. The Court went on to note that a routine check of automobiles by some non-arbitrary, systematic procedure such as a road block or check point is permissible but where there is no systematic routine or objective standard against which to test the stop it can only be assumed that the stop is the result of "arbitrary caprice or curiosity" by the officer. In Ingle the Court rejected the contention that the right to drive was a privilege, pointing out that such a distinction is not given common acceptance and gratuitous, arbitrary or unjustified restraint by the government regardless of its context is not to be condoned. The Court emphasized that the factual basis required to support a traffic stop may be minimal, that is, not rising to the level of probable cause.

The Supreme Court of Pennsylvania has adopted a similar approach in Commonwealth v. Swanger, Supr. Ct. Pa., 307 A.2d 875 (1973). To the same effect is State v. Fisher, Ct. App. Ore., 484 P.2d 864 (1971).

I conclude that the rationale of Ingle and Swanger represents the better view that an arbitrary, unsystematized license check without objective standards has no legal sanction. It should be emphasized that the Court is limiting this decision to a capricious stop. This holding is not intended to apply to road blocks or other systematic traffic checks. In any event, I am satisfied that the stop by the officer in this case was without authority and any evidence secured as a result of that stop must be suppressed. Accordingly, the motion to suppress is granted.

IT IS SO ORDERED.

Very truly yours,

JTW:llf
cc: Prothonotary

§ 4754. Prohibited acts D; penalties.

It is unlawful for any person knowingly or intentionally to possess, use or consume any controlled substance or counterfeit substance classified in Schedule I, II, III, IV or V not a narcotic drug unless the substance was obtained directly from or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or except as otherwise authorized by this chapter. Any person who violates this section upon conviction shall be fined not more than $500 and imprisoned not more than 2 years.

Supreme Court, U. S.
FILED
NOV 27 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1571

DELAWARE,
Petitioner,

v.

WILLIAM J. PROUSE, III

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF DELAWARE

PETITION FOR CERTIORARI FILED MAY 2, 1978
CERTIORARI GRANTED OCTOBER 2, 1978

TABLE OF CONTENTS OF APPENDIX.

	Page
Docket Entries Below:	
Superior Court of the State of Delaware	A1
Supreme Court of the State of Delaware	A4
Superior Court: Suppression Hearing	A6
Anthony Joseph Avena—	
Direct Examination	A7
Cross-Examination	A10
Re-Direct Examination	A13
Re-Cross-Examination	A13
Superior Court: Opinion and Order	A16
Supreme Court: Opinion	A20

Appendix.

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE

v.

WILLIAM J. PROUSE, III

(GREGG E. WILSON, ESQ., D.A.G.) STATE OF DELAWARE *v.* WILLIAM J. PROUSE, III (DAVID M. LUKOFF, ESQ., ASST. P.D.)	I-76-12-0213—POSSESSION OF A NON-NARCOTIC SCHEDULE I CONTROLLED SUBSTANCE. TO WIT: MARIJUANA.

11/30/76	Arrest Date.
12/13/76	Waived Prelim'y Hrg.
12/14/76	Warrant issued thru JP 15, #76-11-0998. $250.00 Unsec. Bail Bond from JP 15.

	#1.	1/13/77	True Bill.
BIFFERATO, J.		1/27/77	Arraigned, Waived Readg., Entered Plea of Not Guilty. Trial 2-15-77. (LUKOFF, ESQ.)
	2.	1/28/77	Copy of Deft. Request for DSC.
WALSH, J.	3.	2/15/77	Suppression Hrg: Reserved Decision.
	4.	2/18/77	Copy of Deft. Memorandum in Support of Mtn. to Suppress.
	5.	3/ 7/77	Copy of States Memorandum in Opposition to Deft. Mtn. to Suppress Evidence.
	6.	3/15/77	Certificate Pursuant to 10 Del. C. §9902(b) Will Be Presented to Judge Walsh.
WALSH, J.	7.	3/10/77	Deft. Mtn. to Suppress—Granted.
WALSH, J.		3/16/77	Paper #6—Signed.
	8.	3/29/77	State's request for Transcript.
	9.	5/27/77	Transcript of Suppression Hearing.

#10.	6/21/77	Copy of State's Notice of Appeal Purs. to 11 Del. C § 9902, Supreme Court § 102, 1977.
11.	7/12/77	Copy of State's Certification Pursuant to Supreme Court Rule 7(8) and State's Request for Transcript.
12.	7/12/77	Records Sent to Supreme Court.
13.	7/15/77	Acknowledged Receipt of Records Recd. From Supreme Court.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

1977 TERM

WILSON
102.
LUKOFF

STATE OF DELAWARE,

Plaintiff Below, Appellant,

v.

WILLIAM J. PROUSE, III,

Defendant Below, Appellee.

1977, March 24. Received and filed notice of appeal from the decision on March 10, 1977, of the Superior Court, in and for New Castle County, in No. I-76-12-0213.

1977, March 30. Received and filed appellants [sic] Certificate pursuant to Rule 7(8).

1977, July 14. Received and filed record including transcript. Counsel notified.

1977, August 3. Received and filed stipulation with Order dated August 3, 1977, extending time for filing of appellant's brief to August 8, 1977.

1977, August 10. Received and filed appellant's opening brief and appendix.

1977, September 26. Received and filed State's supplemental appendix.

1977, September 29. Received and filed appellee's answering brief.

1977, December 13. Argument held.

1978, February 1. Received and filed Opinion decided Jan. 30, 1978 affirming judgment of the Court below. Written by McNeilly, J.

1978, February 13. Record, mandate and Certified Copy of Opinion decided January 30, 1978 to Clerk of Court below.

MANUSCRIPT OF SUPPRESSION HEARING.

(Title Omitted in Printing.)

BEFORE:

HON. JOSEPH T. WALSH, J.

APPEARANCES:

GREGG E. WILSON, ESQ.
Deputy Attorney General
for the State of Delaware

DAVID M. LUKOFF, ESQ.
Assistant Public Defender
for the Defendant.

TRANSCRIPT OF SUPPRESSION HEARING

---

[3]

Courtroom No. 1
11:00 o'clock a.m.
February 15, 1977

PRESENT:

(Counsel for the respective parties presented their opening addresses to the Court.)

STATE'S EVIDENCE

ANTHONY JOSEPH AVENA

ANTHONY JOSEPH AVENA, called as a witness on the part and behalf of the State, being duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. WILSON:

Q. Patrolman Avena, who do you work for?
A. New Castle County Police.
Q. How long have you been employed by New Castle County Police?
A. Two years this past January.
Q. What are your duties with them?
A. Patrol.
Q. What type of patrol is this?
A. Uniform patrol, a marked unit.
Q. What type of enforcement do you do?

[4]

A. Both criminal and traffic, as well as answering complaints.

Q. Do you spend part of your time enforcing the traffic laws in the State of Delaware?

A. Yes, sir.

Q. I direct your attention to the 30th of November, 1976, Miles and New York Avenue, Radnor Green. Did you have an opportunity to encounter the Defendant?

A. Yes, sir.

Q. Would you describe the circumstances?

A. The vehicle, I believe, was first seen by myself on Green Street, in the area of Green and Commonwealth, if I remember correctly. At that time, I followed the vehicle to the place where I had stopped it. When I got to that particular area I pulled the vehicle over. It was more or

less a routine check, basically just to check the driver's license and registration.

When I got to the back of the vehicle, the window was open, partly, partly open, and I could smell what I believed to be marijuana coming from the vehicle. I then spoke with the subject that was sitting in that spot and asked him if there was any marijuana in the vehicle and he said, "No, it was a cigarette." I feel I

[5]

could tell the difference.

I went back to my car and asked for an additional unit, since there were four people in the car.

Q. Why did you call for an additional unit? Would you have done this under a normal traffic stop or——

A. With the circumstances involved and believing there were drugs in the car, I wanted to have somebody else there with me.

Q. What happened next?

A. Prior to the other vehicle coming, I went back to the car and asked the subjects to exit the vehicle; I started talking to them. At that time, I looked in the back seat—the front—the front seat by the passenger's side, looking into the vehicle. I could see a cellophane bag sticking out from underneath the seat, and I pulled it out and it contained some green plant-like material.

At that time, Patrolman Alfree, I believe, read the subjects their rights, and I subsequently rechecked——

Well, there were three guys and one girl. We started to pat them down and that's when the marijuana was found on Mr. Prouse.

[6]

Q. Marijuana concerned in this particular case, then, is marijuana found on the body of Mr. Prouse?

A. I believe so. I wasn't looking directly at the actual search because I had three other people I was tied up with. I did see it when it was taken, and I believe it was in a cigarette pack, if I'm not mistaken, and at that time it was put on the hood of the car, and at that time he was placed under arrest, also.

Q. The Mr. Prouse that you referred to, is he in the courtroom?

A. I believe that is him sitting there, it looks like him.

Q. Going back to this stop that you made, what, again, was the purpose of it?

A. Basically, I told Officer Humphrey I checked for license and registration, I had no other traffic violations or criminal activity.

Q. Do you do this often during your duties as a patrol officer?

A. I have done it before. I wouldn't say often, but I have done it before.

Q. Do you do this in a random manner?

A. Basically, yes.

[7]

Q. Was it in a random manner you stopped the Defendant on that particular day?

A. I saw the car in the area and wasn't answering any complaints, so I decided to pull them off.

Q. You saw the car and had time to make a license check?

A. That is right.

Q. Do you make license checks when you have an opportunity, when you are not responding to other criminal complaints and other vehicles?

A. I have done it several times. I don't make it a habit.

Mr. Wilson: No further questions.

CROSS-EXAMINATION

By Mr. Lukoff:

Q. Patrolman Avena, you indicated this was essentially a routine check?

A. Yes, sir.

Q. There was nothing about the car that was suspicious, I gather?

A. Not to my recollection, no.

Q. And they weren't driving erratically?

A. No.

[8]

Q. No traffic violations?

A. None.

Q. No traffic violations, no erratic driving, and the only reason you stopped, to see if the driver's license or registration was okay?

A. More or less, I guess.

Q. Did you think there was any crime afoot?

A. Not at that time.

Q. So it was only after you had the car pull over that you went up to it and at that point you noticed the odor of marijuana?

A. What I believed to be marijuana, yes, sir.

Q. Where was Mr. Prouse sitting?

A. I will be honest with you, I am not sure who was driving the car. I know the car was registered to him, but I don't know who was driving.

Q. Would your report show?

A. I don't think so. I usually put it in there, but I don't believe it is indicated on there.

Q. What you classify one, suspect one as necessarily being the driver or the first one you would talk to?

A. Not basically, no.

Q. Do you know if Mr. Prouse was the person seated

[9]

where you found the cellophane bag?

A. No, he wasn't in the back seat.

Q. The cellophane bag was in the back?

A. Well, it was underneath the front seat but more towards the back of the vehicle, so if you were in the back seat you would be able to see it sticking out.

Q. It appeared, if it was there, the passenger in the back would have the visibility, whereas someone seated in the front obviously couldn't see it, I presume.

A. I don't think you would be able to see it from the front. If it was put by somebody in the front seat, they would have to reach down and stick it pretty far in, to put it in.

Q. In other words, kind of an awkward action to put it all the way back.

A. I would say.

Q. Mr. Prouse was in the front, you are sure of that?

A. Well, a girl in the back and another subject, the way I recall.

Q. Did you ever check to see if anybody had a license?

A. I believe identification was gotten from them

[10]

once we got them out of the vehicle.

Q. What would be your normal procedure? Would you normally go up to the driver of a car under the circumstances as you presented them? Wouldn't that be the first person you would go to?

A. I think if I didn't smell the marijuana from the back seat I probably would have.

Q. You can't say if Mr. Robert Wright was the driver, or Mr. Richard Wright, or Mr. Prouse, but you are sure it wasn't a woman?

A. No, it wasn't a girl.

Q. Is this a copy of your report?

A. Yes, sir.

Q. That is?

A. Yes, sir.

Q. I note on there is one Richard Wright, S2, Richard Prouse.

A. That is right, William Prouse.

Q. From that you wouldn't assume he was the driver?

A. I don't believe he was the driver. It indicates here S1 arrested for possession of marijuana. As I recall, he was in the back seat with a girl, to my recollection.

Q. Is this a normal routine thing that the police

[11]

department says you should do, is to stop vehicles?

A. It's been done before.

Q. That isn't my question. Does your Department say, when you don't have anything else you're doing and moving around, to just stop a car and check them for license and registration?

A. I don't believe there's any set standards or procedures. It's all——

Q. Are there any guidelines that come out from the Attorney General on this thing?

A. Not to my recollection.

Q. It is something you did, you have done it before on a couple of occasions?

A. I would say yes.

Mr. Lukoff: I have no further questions, Your Honor.

REDIRECT EXAMINATION

By Mr. Wilson:

Q. Patrolman, there were two packages of marijuana found, one in the back seat that you found at first.

A. Yes.

Q. And then the other was found on the Defendant by Patrolman Humphrey.

[12]

A. Yes.

Q. And Patrolman Humphrey made the actual arrest of the Defendant?

A. That is correct.

Q. Did the odor of marijuana pervade the whole car?

A. That is correct. It was fairly strong.

Mr. Wilson: Nothing further.

RECROSS-EXAMINATION

By Mr. Lukoff:

Q. Patrolman Avena, you prepared the first two pages of this report, yourself?

A. Yes.

Mr. Lukoff: Your Honor, for purposes of the hearing, I would suggest this is a 3507-type prior statement, and I would request the Court for an opportunity to review as to his recollection of the events.

I don't know if the Court can ascertain who was the driver or not, but we are not——

The Court: Does it make any difference who was the driver?

Mr. Lukoff: I'm not sure it really does, Your Honor, under those circumstances because we are talk-

ing about stuff taken from the person of Mr. Prouse rather than

[13]

the vehicle stuff, I presume.

The Court: Does it follow, the taking of marijuana is good in that sense, if the stuff was bad——

Mr. Lukoff: If the stuff was bad, I guess everything that followed is bad. If the stuff was good, the question becomes what says—if Mr. Prouse is a passenger in the vehicle where this odor is, what authority is there to search him specifically?

I am not sure it necessarily follows that everything after is good. We are not disagreeing that Mr. Prouse had something on him. The question is, one, whether the police had the right to stop the vehicle and whether, even if they did, could they then search him under those circumstances? And we will agree that he was searched by the other officer. We have no problem with that.

I would submit that the report shows the basis—tells the officer's recollection then of how things happened, which I think is pretty much what he has testified to.

The Court: Do you have any objection to the report going in, Mr. Wilson?

Mr. Wilson: No, Your Honor, I don't have any objections.

The Court: It will be marked Defendant's Exhibit

[14]

(The police report was marked "Defendant's Exhibit 1.")

Mr. Lukoff: I have no further questions of this officer, Your Honor.

The Court: Is there anything further of this witness, Mr. Wilson?

Mr. Wilson: No, Your Honor.

———

• • •

———

STATE OF DELAWARE:
NEW CASTLE COUNTY: } SS:

I, MORRIS D. PEARSON, Official Court Reporter of the Superior Court, State of Delaware, do hereby certify that the foregoing is an accurate transcript of the proceedings, as reported by me, in the Superior Court of the State of Delaware, in and for New Castle County, in the case therein stated as the said remains of record in the Office of the Prothonotary at Wilmington, Delaware.

WITNESS my hand this ..... day of ....., A. D., 1977.

.....
OFFICIAL COURT REPORTER

OPINION AND ORDER OF THE SUPERIOR COURT OF THE STATE OF DELAWARE.

SUPERIOR COURT
OF THE
STATE OF DELAWARE

JOSEPH T. WALSH
Judge

Court House
Wilmington, De. 19801

Gregg E. Wilson, Esq.
Deputy Attorney General
The Wilmington Tower
Wilmington, Delaware 19801

David M. Lukoff, Esq.
Assistant Public Defender
200 Odd Fellows Building
Wilmington, Delaware 19801

RE: State v. William J. Prouse
I76-12-0213

Submitted: March 4, 1977
Decided: March 10, 1977

Gentlemen:

Defendant, charged with Possession of Marijuana, has moved to suppress the evidence against him on the ground that the seizure of the contraband arose from an unauthorized detention of him by the police. The Court conducted an evidential hearing at which the sole witness was the arresting police officer. After the filing of memoranda this is the Court's decision on the motion.

The arresting officer testified that on November 30, 1976, at approximately 7:20 p.m. while on routine paroie he decided to stop a motor vehicle operated by the defendant for a routine driver's license and registration check. He testified that he observed no traffic violations; no motor vehicle equipment violations; no erratic or unusual driving and neither the lateness of the hour nor the location of the automobile gave him any suspicion that the driver or the occupants were engaged in improper activity. The officer testified that when he approached the automobile he smelled what appeared to him to be burning marijuana and upon asking the occupants to emerge from the car he saw a cellophane bag protruding from under the seat. This, in turn, led to the search of the persons of the occupants. Upon the defendant was found material which the State contends was marijuana.

The State concedes that there was no basis for the officer's stopping of this automobile other than his desire to conduct a license and registration check on a random basis. Defendant contends that such a stop is a detention without cause and constitutionally improper.

The lawfulness of a seizure of evidence which stems from a detention for a routine license or registration check has been the comment of decisions in several jurisdictions. While the decisions are not uniform, the trend appears to be one of validating such seizures where the same are the product of systematic checks under objective standards. Thus, approval has been given to seizures resulting from road blocks on the theory that such monitoring is indiscriminate and not based on the whim or caprice of the police officer. Several decisions relied upon by the State involve seizures arising from road blocks and are thus clearly distinguishable. *State v. Smolen*, App. Div. Conn., 232 A. 2d 339 (1967); *City of Miami v. Aronovitz*, Supr. Ct.

Fla., 114 So. 2d 784 (1959); *State v. Severance*, N. H. Supr., 237 A. 2d 683 (1968). Equally distinguishable are those decisions in which the motivation for the stop was the lateness of the hour or suspicious activities or appearance of the driver or occupants. *Glover v. State of Maryland*, Md. App., 287 A. 2d 333 (1972); *State v. Braxton*, N. J. Super., 268 A. 2d 40 (1970); *State v. Allen*, N. C. Supr., 194 S. E. 2d 9 (1973); *State v. Williams*, S. C. Supr., 116 S. E. 2d 858 (1960). Two cases advanced by the State appear to sanction a non-systematic random stop for license checks. *Palmore v. U. S.*, D. C. App., 290 A. 2d 573 (1972); *State v. Holmberg*, Neb. Supr., 231 N. W. 2d 672 (1975).

The New York Court of Appeals in *People v. Ingle*, N. Y. Ct. App., 369 N. Y. S. 2d 67 (1976) reversed the conviction of a defendant from whom drugs were seized in a factual situation identical to that now under consideration. The Court pointed out that there must be some valid reason, however slight, for the singling out of a particular automobile and its operator for a stop and an inspection to determine compliance with the motor vehicle law. The Court went on to note that a routine check of automobiles by some non-arbitrary, systematic procedure such as a road block or check point is permissible but where there is no systematic routine or objective standard against which to test the stop it can only be assumed that the stop is the result of "arbitrary caprice or curiosity" by the officer. In *Ingle* the Court rejected the contention that the right to drive was a privilege, pointing out that such a distinction is not given common acceptance and gratuitous, arbitrary or unjustified restraint by the government regardless of its context is not to be condoned. The Court emphasized that the factual basis required to support a traffic stop may be minimal, that is, not rising to the level of probable cause.

The Supreme Court of Pennsylvania has adopted a similar approach in *Commonwealth v. Swanger*, Supr. Ct. Pa., 307 A. 2d 875 (1973). To the same effect is *State v. Fisher*, Ct. App. Ore., 484 P. 2d 864 (1971).

I conclude that the rationale of *Ingle* and *Swanger* represents the better view that an arbitrary, unsystematized license check without objective standards has no legal sanction. It should be emphasized that the Court is limiting this decision to a capricious stop. This holding is not intended to apply to road blocks or other systematic traffic checks. In any event, I am satisfied that the stop by the officer in this case was without authority and any evidence secured as a result of that stop must be suppressed. Accordingly, the motion to suppress is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ JOSEPH T. WALSH

JTW: llf
cc: Prothonotary

OPINION OF THE SUPREME COURT OF THE STATE OF DELAWARE.

IN THE SUPREME COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,
Plaintiff Below,
Appellant,
v.
WILLIAM J. PROUSE, III,
Defendant Below,
Appellee.

No. 102, 1977.

Submitted: December 13, 1977

Decided: January 30, 1978

Before HERRMANN, *Chief Justice*, DUFFY and MCNEILLY, *Justices*.

Upon appeal from Superior Court. Affirmed.

Gregg E. Wilson, Deputy Attorney General, Wilmington, for plaintiff below, appellant.

David M. Lukoff, Assistant Public Defender, Wilmington, for defendant below, appellee.

MCNEILLY, Justice

The State of Delaware appeals, pursuant to 10 *Del. C.* § 9902(b) and (c),* a Superior Court order which granted defendant's motion to suppress evidence. The challenged evidence was obtained by police during a random stop of defendant's automobile, and the issue raised is whether the police may arbitrarily stop and detain persons operating motor vehicles when the officers involved have no reasonable suspicion that the occupants of the stopped vehicle have or will violate the law. Because we are of the opinion that non-systematic stops by police, who have no reasonable suspicion that a legal violation has occurred, violate Federal and State constitutional guarantees, we affirm the Superior Court order and dismiss this appeal.

I.

While on routine patrol Officer Anthony Avena of the New Castle County Police stopped an automobile operated by defendant-Prouse to conduct a driver's license and vehicle registration check. Prior to the stop the officer observed no traffic or equipment violations, and had no

---

* 10 *Del. C.* § 9902(b) and (c) read as follows:

§ 9902. Appeal as of right.

(b) When any order is entered before trial in any court suppressing or excluding substantial and material evidence, the court, upon certification by the Attorney General that the evidence is essential to the prosecution of the case, shall dismiss the complaint, indictment or information or any count thereof to the proof of which the evidence suppressed or excluded is essential. Upon ordering the complaint, indictment or information or any count thereof dismissed pursuant to the Attorney General's certification, the reasons of the dismissal shall be set forth in the order entered upon the record.

(c) The State shall have an absolute right of appeal to an appellate court from an order entered pursuant to subsection (b) of this section and if the appellate court upon review of the order suppressing evidence shall reverse the dismissal, the defendant may be subjected to trial. (10 Del. C. 1953, § 9902; 57 Del. Laws, c. 133; 58 Del. Laws, c. 412, § 1.)

indication that any criminal activity had been or would be perpetrated by defendant or the other occupants of his car. Officer Avena candidly testified that defendant's car was randomly chosen from other vehicles on the road to be the subject of a license and registration check, and that he regularly made similar routine stops of motor vehicles when not answering complaints. As the officer approached defendant's automobile he smelled the aroma of marijuana emanating from the car. While observing the occupants of the car step out into the street, Officer Avena noticed a cellophane bag containing leafy vegetable matter protruding from under the front seat. Suspecting that it contained marijuana, Officer Avena seized the bag and, thereafter, placed defendant under arrest. Subsequently, defendant was indicted for possession of a non-narcotic Schedule I substance in violation of 16 *Del. C.* § 4754.*

Defendant moved in Superior Court for an order suppressing the evidence against him on the ground that it had been obtained during an illegal detention. After an evidentiary hearing the Superior Court granted defendant's motion. The State concedes that defendant was detained in circumstances where the investigating officer had no reasonable suspicion that any criminal activity or motor vehicle violation had or would take place. However, the State asserts that the practice of randomly stopping motor

* 16 *Del. C.* § 4754 reads as follows:

§ 4754. Prohibited acts D; penalties.

It is unlawful for any person knowingly or intentionally to possess, use or consume any controlled substance or counterfeit substance classified in Schedule I, II, III, IV or V not a narcotic drug unless the substance was obtained directly from or pursuant to a valid prescription or order of a practitioner while acting in the course of his professional practice or except as otherwise authorized by this chapter. Any person who violates this section upon conviction shall be fined not more than $500 and imprisoned not more than 2 years. (16 Del. C. 1953, § 4754; 58 Del. Laws, c. 424, § 1.)

vehicles for license and registration examinations is both constitutionally permissible, and necessary to properly enforce motor vehicle regulations.

The issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is *not* now before the Court. Systematic stopping procedures entail limited exercise of discretion concerning which vehicles to stop, and, therefore, pose legal issues different in nature from those presented by the random stop practice challenged here. We now focus on the competing State and individual interests which must be examined in order to determine the validity of random stopping procedures.

II.

The Fourth Amendment to the United States Constitution provides;

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The constitutional proscription against unreasonable searches and seizures is made applicable to the States by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *Mapp v. Ohio*, 367 U. S. 643 (1961); *United States ex rel. Dyton v. Ellingsworth*, 306 F. Supp. 231 (D. Del. 1969). The Delaware Constitution Article I, § 6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former. *State v. Moore*, Del. Super., 187

A. 2d 807 (1963). Evidence seized in disregard of these constitutional provisions is inadmissible at the trial of the person whose rights have been violated. *Mapp v. Ohio, supra; Schaffer v. State,* Del. Supr., 184 A. 2d 689 (1962). The precise legal issue raised in this appeal is whether the stop of defendant's automobile was an unconstitutional seizure within the meaning of the Fourth and Fourteenth Amendents. While a temporary stop or detention of a motor vehicle and its occupants is not normally described as a seizure, the Fourth Amendment has been construed to protect against unreasonable governmental intrusions into the privacy of the individual, regardless of whether they are labeled stops, detentions, frisks or seizures. *Terry v. Ohio,* 392 U. S. 1 (1968); *Sibron v. New York,* 392 U. S. 40 (1968). Therefore, since the police action here entailed an interference with defendant's right to free access to public highways, it is an official intrusion which must be examined to see if it accords with Fourth Amendment requirements. If the police acted unreasonably then the evidence gathered as a result of their activities must be suppressed. *Schaffer v. State, supra.*

A search or seizure pursuant to a duly issued warrant is presumptively valid because a determination of the reasonableness of the intended action is made prior to its inception by a neutral Magistrate. *Johnson v. United States,* 333 U. S. 10 (1948); *Saienni v. State,* Del. Supr., 346 A. 2d 152 (1975). There are instances in which a warrant is unnecessary for a legitimate search and seizure due to circumstances which make a warrantless search reasonable. See *Carroll v. United States,* 267 U. S. 132 (1925). Included within the warrant exception are cases where law officers have probable cause to believe that an automobile, or other readily moveable vehicle, is carrying contraband, is being driven in violation of the motor ve-

hicle laws, or the occupants are or have been committing criminal violations. *Carroll v. United States, supra; Freeman v. State,* Del. Supr., 317 A. 2d 540 (1974). Where a legal arrest has been made, a police officer may search the arrested person without a warrant. *Ker v. California,* 374 U. S. 23 (1963); *Lido Social Club v. State,* Del. Super., 86 A. 2d 859 (1952). A protective frisk of one suspected of criminal activity may also be conducted by police. *Terry v. Ohio, supra.* The essential element necessary for a permissible governmental intrusion is reasonableness, with a constitutionally mandated preference for warrants absent exceptional circumstances. *Johnson v. United States, supra.*

Because an automobile was the subject of the stop in the case at bar, we may invoke the *Carroll* exception to eliminate any warrant requirement. However, absent here is the element of probable cause which was essential to the reasonableness and legitimacy of the search and seizure in *Carroll.* As the Court said in *Carroll*:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. Travelers may be so stopped in crossing an international boundary because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in. But those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for be-

> lieving that their vehicles are carrying contraband or illegal merchandise. *Carroll v. United States, supra,* at 153, 154.

We note that the *Carroll* decision has been cited with approval by the Supreme Court of the United States as recently as 1977. See *United States v. Ramsey,* — U. S. —, 97 S. Ct. 1972 (1977).

The search and seizure of defendant's vehicle must be justified, if at all, on grounds other than a finding that the investigating officer had probable cause to make the stop, since the State agrees that he did not. The critical question is whether there are any legitimizing factors present here which would justify the police action. The United States Supreme Court has set forth the following standard for judging the reasonableness of an official search or seizure:

> [I]t is necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen, for there is no ready test for balancing the need to search [or seize] against the invasion which the search [or seizure] entails. *Terry v. Ohio,* supra at 20, 21.

The State seeks to justify the initial detention of defendant* on the ground that a documents check is a reasonable form of limited detention of those operating motor vehicles on State highways. The State points to the inherent

* We assume, as all counsel involved herein have, that if the initial detention of defendant was constitutional, all subsequent police acts were also since the marijuana was in the "plain view" of Officer Avena and as contraband it was subject to immediate seizure. *Ker v. California,* supra; *Miller v. State,* Del. Supr., 310 A. 2d 867 (1973).

danger involved in the operation of motor vehicles, as evidenced by the large number of traffic related injuries which occur in this State and the United States generally, and concludes that the State has a substantial interest in regulating the use of the highways, and enforcing its licensing and vehicle registration laws. The State contends that the most effective method of enforcing its licensing and registration laws is to randomly stop motorists to check compliance with those laws. The State completes its argument by asserting that because they are necessary to further a legitimate State interest, random vehicle stops for the limited purpose of conducting a documents check are reasonable and constitutional even in the absence of probable cause.

We rule that before the government may single out an automobile to stop it, there must exist specific facts justifying the intrusion. Conversely, a random stop in the absence of specific justifying facts is unreasonable and unconstitutional. See *Commonwealth v. Swanger,* Pa. Supr., 307 A. 2d 875 (1973), and *People v. Ingle,* N. Y. Ct. App., 369 N. Y. S. 2d 67 (1975). We recognize the legitimate state interest in enforcing licensing and registration laws, and note that in fact situations similar to that of the present case other courts have reached the conclusion that the state interests outweigh the interests of the individual. See *State v. Holmberg,* Neb. Supr., 231 N. W. 2d 672 (1975), and *State v. Williams,* S. C. Supr., 116 S. E. 2d 858 (1960). However, the factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedure. The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any

visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possibility of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures could be practiced with little or no chance for judicial review.

It has been asserted that a rigid invalidity rule as we adopt here is too broad, and that only where actual discriminatory intent is shown to have motivated the stopping officer, or where a license check is used as a pretext to investigate unrelated crime, should the random stop be illegal. See *Palmore v. United States,* D. C. Ct. App., 290 A. 2d 573 (1972). However, burdening a criminal defendant with the task of proving that a police officer acted with an illegal subjective intent would as a practical matter emasculate any limited rule concerning random stopping procedures, and in turn, emasculate Fourth Amendment rights.*

We hold, therefore, that a random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution. It follows that a random stop solely for the purpose of a documents check is an unreasonable and unconstitutional detention of those in the stopped vehicle. Because the stop in the present case was arbitrary, and not based on justifying facts, it was illegal, and the evidence gathered as a result of the stop must be excluded from defendant's trial. The

* For a thorough discussion of this important point See Note, Automobile License Checks and the Fourth Amendment, 60 Va. L. R. 666 (1974).

Superior Court order granting defendant's motion to suppress was correct as a matter of law.

AFFIRMED.

FILED
JUL 5 1978
MICHAEL RODAK, JR., CLERK

3

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

STATE OF DELAWARE,

Petitioner,

v.

WILLIAM J. PROUSE, III,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF DELAWARE

BRIEF FOR RESPONDENT IN OPPOSITION

RICHARD M. BAUMEISTER

RICHARD E. FAIRBANKS, JR.

DAVID M. LUKOFF
Assistant Public Defenders
200 Odd Fellows Building
Tenth and King Streets
Wilmington, Delaware 19801

Attorneys for Respondent

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1977

No. 77-1571

STATE OF DELAWARE,

Petitioner,

v.

WILLIAM J. PROUSE, III,

Respondent.

ON WRITE OF CERTIORARI TO THE SUPREME COURT OF DELAWARE

BRIEF FOR THE RESPONDENT IN OPPOSITION

CITATION TO OPINION BELOW

The opinion of the Supreme Court of the State of Delaware has recently been reported as follows: State v. Prouse, Del.Supr., 382 A.2d 1359 (1978).

OPPOSITION TO JURISDICTION

The Delaware Supreme Court is not a court of appeals within the meaning of 28 U.S.C. §1254(1) and consequently jurisdiction can not be so invoked. But see, 28 U.S.C. §1257(3). Moreover, Petitioner has failed to raise an issue of federal constitutional dimensions requiring review by this Court. See Respondent's answer to Petitioner's Reasons For Granting the Writ. Argument I, infra.

CONSTITUTIONAL AND STATUORY PROVISIONS INVOLVED

The constitutional statutory provisions involved are set forth in the Petition except as follows:

Constitution of the State of Delaware, 1897, Article I, §6.

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation.

STATEMENT OF THE CASE

On November 30, 1976, Patrolman Anthony Avena of the New Castle County Police Department stopped the motor vehicle operated by Respondent, William J. Prouse, III. The officer was not answering complaints and stopped Respondent in a random manner in order to conduct a license and vehicle registration check. Patrolman Avena had observed no traffic or equipment violations nor indeed any unusual or suspicious activity, criminal or otherwise. This stop was purely discretionary and neither the New Castle County Police Department nor the Attorney General's Office had set standards nor guidelines in this area.

After stopping Respondent's vehicle, Patrolman Avena approached and smelled what he believed to be marijuana. Upon further investigation, the officer observed a cellophane bag protruding from under the seat. The bag was found to contain green plant-like material.

The patrolman then searched the occupants and found marijuana in Respondent's pocket. As a result, Respondent was arrested and subsequently indicted for Possession of a Non-Narcotic Schedule I Substance in violation of 16 Del.C. §4754.

In the Superior Court of the State of Delaware, In and For New Castle County, Respondent moved to suppress the evidence (marijuana) against him asserting that it was obtained as the result of an illegal stop (seizure). After an evidentiary hearing, the Superior Court granted Respondent's motion.

The State of Delaware, Petitioner, appealed to the Supreme Court of the State of Delaware pursuant to 10 Del.C. §9902(b)(c). The Delaware Supreme Court affirmed the Superior Court ruling. State v. Prouse, Del.Supr., 382 A.2d 1359 (1978).

PETITIONER'S REASON FOR GRANTING THE WRIT

I. THIS CASE PRESENTS A NEW AND IMPORTANT QUESTION OF FEDERAL LAW.

Respondent respectfully submits that Petitioner's argument is incorrect. The decision by the Supreme Court of Delaware does not prevent the police from enforcing license and vehicle registration laws. As the record indicates, neither the Police Department nor the Attorney General's Office had set standards, procedures or guidelines in this area. It is thus incredible that the random and discretionary stopping of motorists is "the most effective method for enforcing" such laws. The Delaware Supreme Court spoke to the State's concern and was not persuaded. As the Court noted: "The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop." State v. Prouse, Del.Supr., 382 A.2d 1359, 1364 (1978). Moreover, the Delaware Court held: "The issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is not now before the Court." State v. Prouse, supra at 1362. Thus, the Delaware decision by its terms has only limited application to the instant case.

Respondent questions whether Petitioner's assertion of a new and important question of Federal Law is correct. Respondent submits that the decision of the Delaware Supreme Court rested on independant state, as well as federal constitutional law. In its opinion the Court held:

> The Delaware Constitution Article I, §6 is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former. State v. Moore, Del.Super., 187 A.2d 807 (1963). Evidence seized in disregard of these constitutional provisions is inadmissible at the trial of the person whose rights have been violated. Mapp v. Ohio, supra; Schaffer v. State, Del.Supr., 184 A.2d 689 (1962).

State v. Prouse, supra at 1362. Thus, the federal constitutional issue was not a sole basis for this decision. This Court has jurisdiction to review only if the federal question is the sole basis for the decision. Mental Hygiene Dept. of Cal. v. Kirchner, 380 U.S. 194, 85 S.Ct. 871, 13 L.Ed.2d 753 (1965). The Supreme Court of Delaware has found that Article I, §6 of the Delaware Constitution of 1897 was the basic equivalent of the Fourth Amendment. State v. Prouse, supra; State v. Moore, supra. In the case at bar, the Delaware Courts spoke to both the federal and state constitutional questions. Petitioner states: "Because the Delaware Courts felt constrained by the Fourth Amendment, the evidence was suppressed under Mapp v. Ohio, 367 U.S. 643 (1961)." Petition for Writ of Certiorari at 5. However, Petitioner has not supported that naked assertion. As this Court has said:

> This Court is always wary of assuming jurisdiction of a case from a State Court unless it is plain that a Federal question is necessarily presented, and the party seeking review here must show that we have jurisdiction of the case.

Mental Hygiene Dept. of Cal. v. Kirchner, supra at 197, 85 S.Ct. at , 13 L.Ed.2d at 756 (footnote omitted). Petitioner has not made such a showing and consequently this Court is without jurisdiction to hear this case. See also, Henry v. Mississippi, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965); Jankovich v. Indiana Toll Road Comm., 379 U.S. 487, 85 S.Ct. 493, 13 L.Ed 2d 439 (1965).

Thus, because the decision of the Delaware Supreme Court was not based solely and exclusively on federal constitutional law, this case does not, then, present an important question of federal law such that this Court should grant the Writ of Certiorari.

II. THE DECISION BELOW IS IN CONFLICT WITH OTHER FEDERAL AND STATE COURT DECISIONS

As Petitioner notes, other jurisdictions have reached contrary results when addressing the issue at bar. Indeed the Delaware Supreme Court so recognized. State v. Prouse, supra at 1364. However, Respondent respectfully submits that although a divergence of opinion exists, it is not pervasive enough to require the issuance of a Writ of Certiorari in this case.

III. THE DECISION BELOW IS INCORRECT

Respondent respectfully asserts that the decision in the Delaware Supreme Court is correct. Although this Court has not expressly ruled on the constitutionality of random and discretionary stops by law enforcement agencies to conduct a document check, the decision of the Delaware Supreme Court follows the reasoning of this Court's recent holdings. United States v. Ortiz, 422 U.S. 891, 95 S.Ct. 2585 45 L.Ed.2d 623 (1975); United States v. Brignoni-Ponce, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); United States v. Martinez-Fuerte, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). In Brignoni-Ponce, this Court held that before the border patrol can stop a vehicle and investigate, there must be reasonable suspicion that the particular vehicle contains illegal aliens. Likewise, the Delaware Supreme Court in the case at bar held: "We rule that before the government may single out an automobile to stop it, there must exist specific facts justifying the intrusion. Conversely, a random stop in the absence of specific justifying facts is unreasonable and unconstitutional." State v. Prouse, supra at 1364. Admittedly, the constitutional test is reasonableness; however, the random and discretionary stop in this case is unreasonable because of the "inherent arbitrariness of the procedure" Id. As the Delaware Court noted, to adopt anything but a rigid invalidity rule would emasculate the Fourth Amendment guarantees because a more subjective approach would be highly impractical to enforce. Id. In essence then, the Delaware Supreme Court was following this Court's decision in Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) and its progeny.

As has been noted, the Delaware decision expressly did not reach the issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration document checks. State v. Prouse, supra at 1362. Moreover, the interest of the State in enforcing such laws is adequately protected by compliance with the Delaware Supreme Court's decision. Petitioner has failed to establish any special or compelling need in this area of law enforcement. Thus, the Delaware Court has properly balanced the governmental need for such intrusion against the individual's right to be free of such

random governmental intrusions without apparent reason.

Petitioner's assertion that systematic, roadblock-type stops cause greater inconvenience to motorists than do random and discretionary stops is clearly unfounded. Indeed as this Court noted: ". . . the differences between a roving patrol and a check point would be significant in determining the propriety of the stop . . ." United State v. Ortiz, 422 U.S. at 895, 95 S.Ct. at 2588, 45 L.Ed.2d at 628. A motorist is less likely to be frightened and annoyed if he sees a uniform, systematic procedure for detecting such document violations then if he were singled out for no apparent reason. In Ortiz, this Court has recognized that the Fourth Amendment's requirement that searches be reasonable also limits the police use of unnecessarily frightening or offensive methods of investigation. The Delaware decision then provides law enforcement agencies with effective means of enforcing license and vehicle registration laws by the continued availability of Terry type stops and an acceptance of systematic roadblocks. Moreover, this decision also protects the individual's right to be free from unreasonable governmental intrusions by eliminating arbitrary, random and discretionary stops. The balance struck by the Court below comports with the requirements of the Fourth Amendment. Consequently, the decision of the Supreme Court of Delaware is correct.

CONCLUSION

For the foregoing reasons, Respondent respectfully urges that the Petition for Writ of Certiorari should be denied.

RICHARD M. BAUMEISTER
Assistant Public Defender

RICHARD E. FAIRBANKS, JR.
Assistant Public Defender

DAVID M. LUKOFF
Assistant Public Defender
Office of the Public Defender
200 Odd Fellows Building
Tenth and King Streets
Wilmington, Delaware 19801

Supreme Court, U. S.
FILED
NOV 21 1978
MICHAEL RODAK, JR., CLERK

No. 77-1571.

IN THE

Supreme Court of the United States

October Term, 1977.

DELAWARE,

Petitioner,

v.

WILLIAM J. PROUSE, III.

On Writ of Certiorari to the Supreme Court of the State of Delaware.

BRIEF FOR THE STATE OF DELAWARE.

RICHARD R. WIER, JR.,
Attorney General of the State of Delaware.

CHARLES M. OBERLY, III,
State Prosecutor.

CAROLYN BERGER,
FRED S. SILVERMAN,
KATHLEEN MOLYNEUX,
Deputy Attorneys General,
Department of Justice,
State Office Building,
820 N. French Street,
Wilmington, Delaware. 19801

International Printing Co., 711 So. 50th St., Phila., Pa. 19143 — Tel. (215) 727-8711

INDEX.

	Page
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
QUESTION PRESENTED	2
STATEMENT OF THE CASE	3
ARGUMENT	5
Random Stops of Motorists to Conduct Routine Driver's License and Vehicle Registration Checks Are Constitutional	5
I. The Governmental Interest Promoted by Random Motor Vehicle Stops Is Direct and Substantial	6
A. The Undisputed Purpose of Spot-Checks Is to Enforce Driver's License and Vehicle Registration Laws and Thereby to Promote Public Safety	6
B. Random Spot-Checks Provide Significant Public Protection by Removing From the Roads Unfit Drivers and Vehicles Before They Injure, Maim or Kill Innocent People	8
C. The Motoring Public Accepts Random Stops as a Necessary Incident to the Enforcement of Motor Vehicle Laws	9
D. The Random Spot-Check Is the Only Effective Means of Enforcing Driver's License and Vehicle Registration Laws	9
II. The Intrusion to Motorists Caused by License and Registration Checks Is No More Than a Minor Inconvenience	11

INDEX (Continued).

	Page
A. Random Spot-Checks Have Minimal Objective or Emotional Impact on Innocent Motorists	12
B. Spot-Checks Do Not Interfere With Any Reasonable Expectation of Privacy	13
C. The Exact Correlation Between Traffic Stops and the Laws They Enforce Reduces the Intrusiveness of Such Stops	13
III. The Important Governmental Interest in Public Safety, Advanced by Random Spot-Checks, Must Prevail When Balanced Against the Lmited Intrusion of a Momentary Stop	14
CONCLUSION	16
PETITIONER'S APPENDIX	17

CITATIONS.

Cases:	Page
Carroll v. United States, 267 U. S. 132	13
Commonwealth v. Swanger, Pa., 307 A. 2d 875	15
Leonard v. State, 496 S. W. 2d 576	8, 11
Lipton v. United States, 348 F. 2d 591	7, 9
Myricks v. United States, 370 F. 2d 901	7, 11
State v. Allen, 282 N. C. 503, 194 S. E. 2d 9	8, 9
State v. Holmberg, 194 Neb. 337, 221 N. W. 2d 672	7, 9, 11
State v. Prouse, Del. Supr., 382 A. 2d 1359	1, 7
Terry v. Ohio, 392 U. S. 1	5, 11, 12, 15, 16
United States v. Brignoni-Ponce, 422 U. S. 873	5, 10, 11
United States v. Martinez-Fuerte, 428 U. S. 543	5, 9, 10, 11, 13, 14
United States v. Montgomery, 561 F. 2d 875	11, 15

United States Constitution:	
Fourth Amendment	2, 5
Fourteenth Amendment	2

Statutes:	
10 *Del. C.* § 9902(b), (c)	3
16 *Del. C.* § 4754	3
21 *Del. C.* § 2101	2, 6, 7
21 *Del. C.* § 2118	2, 7
21 *Del. C.* § 2142	2, 7
21 *Del. C.* § 2143	2, 7
21 *Del. C.* § 2701	2, 6
21 *Del. C.* § 2705	2, 6
21 *Del. C.* § 2707	2, 7
21 *Del. C.* § 2713	2, 6
21 *Del. C.* § 2732	2, 7
21 *Del. C.* § 2733	2, 7
28 U. S. C. § 1257(3)	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

DELAWARE,
Petitioner,

v.

WILLIAM J. PROUSE, III.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

BRIEF FOR THE STATE OF DELAWARE.

OPINIONS BELOW.

The opinion of the Supreme Court of the State of Delaware appears as *State v. Prouse*, Del. Supr., 382 A. 2d 1359 (1978) (A20). The opinion of the Superior Court of the State of Delaware is not reported (A16).

JURISDICTION.

The opinion of the Supreme Court of the State of Delaware was filed on February 1, 1978. The petition for certiorari was filed on May 2, 1978 and was granted on October 2, 1978. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED.

United States Constitution, Amendment Four:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment Fourteen, Section One:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED.

This case involves 21 *Del. C.* §§ 2101, 2118, 2142, 2143, 2701, 2705, 2707, 2713, 2721, 2732, 2733 (1974). These provisions are reprinted in the appendix attached hereto (hereinafter cited as Pet. App. —). This case also involves 10 *Del. C.* § 9902(b), (c) (A21), and 16 *Del. C.* § 4754 (A22).

QUESTION PRESENTED.

Are the Fourth and Fourteenth Amendments to the United States Constitution violated when police officers randomly stop motorists to conduct routine driver's license and vehicle registration checks?

STATEMENT OF THE CASE.

During the evening of November 30, 1976, patrolman Anthony Avena of the New Castle County Police Department was on road patrol (A17). At approximately 7:20 p.m. Patrolman Avena stopped an automobile being operated by Respondent, William J. Prouse, III (A17). Prior to stopping Respondent's vehicle the officer had observed no traffic or equipment violations nor any unusual or suspicious activity. Respondent was stopped for a routine spot-check of his driver's license and vehicle registration (A9-10, 17, 21-22).

After stopping Respondent's vehicle, Patrolman Avena approached it on foot. As he got to the back of the vehicle he observed that its window was partly open and he detected the smell of marijuana coming from the vehicle. At that time, the officer asked Respondent and the vehicle's other occupants to step outside. As they complied with his request, the officer observed a cellophane bag protruding from underneath the front seat. The bag, upon closer inspection, was found to contain green plant-like material. The officer then searched the occupants of the vehicle. During this search marijuana was discovered in Respondent's pocket (A8, 17, 22).

Subsequently, Respondent was indicted for Possession of a Non-Narcotic Schedule I Substance in violation of 16 *Del. C.* § 4754 (A22). Respondent, in the Delaware Superior Court, moved for an order suppressing the evidence against him on the ground that it had been obtained during an illegal detention. After an evidentiary hearing, the Superior Court granted Respondent's motion.

Petitioner appealed to the Supreme Court of the State of Delaware pursuant to 10 *Del. C.* § 9902(b), (c) (A3, 21). In affirming the Superior Court ruling, the Delaware Supreme Court held:

> ". . . [a] random stop of a motorist in the absence of specific articulable facts which justify the stop by indicating a reasonable suspicion that a violation of the law has occurred is constitutionally impermissible and violative of the Fourth and Fourteenth Amendments to the United States Constitution. It follows that a random stop solely for the purpose of a documents check is an unreasonable and unconstitutional detention of those in the stopped vehicle." (A28).

The facts of this case have never been in dispute, and they are set out in greater detail in the appendix (A7-13, 17, 21-22).

ARGUMENT.

Random Stops of Motorists to Conduct Routine Driver's License and Vehicle Registration Checks Are Constitutional.

This case calls into question the long standing and commonly accepted police practice of briefly stopping randomly selected motorists for spot-checks of their driver's licenses and motor vehicle registrations. Although any detention of an individual by the police constitutes a seizure under the Fourth Amendment, *United States v. Brignoni-Ponce*, 422 U. S. 873, 878 (1975), citing *Terry v. Ohio*, 392 U. S. 1, 16-19 (1965), the watchword in deciding the constitutional issue herein is the "reasonableness" of stopping a motorist for the limited purpose of conducting a spot-check.

The balancing test the Court has developed to measure the validity of police conduct requires the public interests served by the seizure to be weighed against the seizure's impact on the detained individual's Fourth Amendment interests. *United States v. Martinez-Fuerte*, 428 U. S. 543, 555 (1976), citing *United States v. Brignoni-Ponce, supra*, 422 U. S. at 878, and *Terry v. Ohio, supra*, 392 U. S. at 22. First, the nature and extent of the governmental interests involved must be considered. Factors which are relevant in this regard include the purpose of the stop, the degree of public protection afforded, the public perception of the police conduct, and the availability of alternative effective procedures. Second, the quality and degree of intrusion on individual freedom must be ascertained. The intrusion can be defined by its objective and subjective impact, the individual's expectation of privacy, and the degree of correlation between the individ-

ual's conduct and the intrusive police activity. Finally, the substantial governmental interests advanced by the spot-checks must be compared to the momentary inconvenience they cause.

I. The Governmental Interest Promoted by Random Motor Vehicle Stops Is Direct and Substantial.

A. The Undisputed Purpose of Spot-Checks Is to Enforce Driver's License and Vehicle Registration Laws and Thereby to Promote Public Safety.

Like its sister states, Delaware is vitally concerned with highway safety. This concern embraces the best interest of all of its citizens. On a daily basis the safety of Delaware's roads affects the lives of its workers going to and from their jobs, its homemakers doing their errands, its children in school buses and its pedestrians crossing the streets.

In order to promote highway safety, Delaware regulates the use of its roads. This regulation is effected, in part, through driver's license and motor vehicle registration laws, 21 *Del. C.* §§ 2101, 2701 (1974) (Pet. App. 17, 19). In effect, this case will determine how thoroughly, or even if, these important laws will be enforced.

Pursuant to the license and registration laws, Delaware's Department of Motor Vehicles (D. M. V.) screens and examines nearly every person who wishes to use Delaware's roads,[1] 21 *Del. C.* § 2713 (Pet. App. 22). The D. M. V. is prohibited by law from issuing an operator's permit to a child, drunkard, drug addict, incompetent or anyone whose presence behind the wheel of a moving

1. Only farm equipment operators, road machinery operators and members of the armed forces, when on duty, are exempt from the requirement of having a driver's license, 21 *Del. C.* § 2705 (Pet. App. 3).

vehicle is a threat to himself or others on the highway, 21 *Del. C.* § 2707 (1974) (Pet. App. 19-22). Likewise, the D. M. V. will revoke or suspend the license of anyone who has seriously or repeatedly abused the driving privilege, 21 *Del. C.* §§ 2732, 2733 (1974) (Pet. App. 24-26).

By law, vehicles using Delaware roads must be registered, 21 *Del. C.* § 2101 (1974) (Pet. App. 17). Before being registered, however, the vehicle's owner must be insured, 21 *Del. C.* § 2118 (1974) (Pet. App. 17), and the vehicle must be inspected to determine whether it is in a safe and fit condition to be operated upon Delaware's highways, 21 *Del. C.* §§ 2142, 2143 (1974) (Pet. App. 17-19).

In view of the death and destruction that takes place on the roads of Delaware and throughout the country, the vital importance of a state's regulation of its highways' use cannot be denied. Likewise, the critical role the driver's license and vehicle registration laws play in Delaware's regulatory scheme is beyond dispute.

The Delaware Supreme Court expressly recognized the legitimate state interest in enforcing licensing and registration laws, *State v. Prouse*, Del. Supr., 382 A. 2d 1359, 1364 (1978) (A20 *et seq.*). Many other courts have also acknowledged the importance of similar laws, c.f. *Lipton v. United States*, 348 F. 2d 591, 593 (9th Cir. 1975); *Myricks v. United States*, 370 F. 2d 901, 904 (5th Cir.), *cert. dismissed*, 368 U. S. 1015 (1967);[2] *State v. Holmberg*,

2. The analysis of the Fifth Circuit in *Myricks v. United States, supra*, is most compelling:

> "The Constitution is a living document. If it lives, it must take account of the dominant symbol of today's dynamic society. It must recognize, therefore, that Texas has a legitimate interest in the roadworthiness of automobiles which transport, but which maim and kill. C.F. Ford Motor Co. v. Mathis, 5 Cir., 1963, 322 F. 2d 267, 3 A. L. R. 3d 1002. This comprehends both technical fitness of the driver and the mechanical fitness of the machine. After the event it is always too late. The State can practice preventative therapy by

194 Neb. 337, 221 N. W. 2d 672, 677 (1975); *State v. Allen*, 282 N. C. 503, 194 S. E. 2d 9, 15 (1973); *Leonard v. State*, 496 S. W. 2d 576, 577 (Tex. Crim. App. 1973).

B. Random Spot-Checks Provide Significant Public Protection by Removing From the Roads Unfit Drivers and Vehicles *Before* They Injure, Maim or Kill Innocent People.

A law that is not enforced can provide only minimal public protection, at best. Without random spot-checks, the unlicensed driver or his unregistered vehicle will only be discovered in conjunction with a police investigation of other motor vehicle violations such as failure to stop at a traffic signal or improper lane changes. Unfortunately, such a police investigation often begins at the scene of an accident.

The unlicensed driver does not readily reveal himself in the course of normal highway travel. While able to control a vehicle on a wide thoroughfare, under the watchful gaze of a police officer, the unlicensed driver may cause tragedy minutes later when he passes a stopped school bus or crosses a double yellow line on a hill. Similarly, a motor vehicle with weak and failing brakes only becomes apparent too late, when a child darts out into the street. The random spot-check is a prophylactic measure that provides a high degree of public protection by weeding out potentially dangerous drivers and automobiles before they take their toll in human life and property damage. In addition, the vigilant enforcement of license and registration laws serves as a general deterrent.

2. (Cont'd.)
reasonable road checks to ascertain whether man and machine meet the legislative determination of fitness. That this requires a momentary stopping of the traveling citizen is not fatal."

C. The Motoring Public Accepts Random Stops as a Necessary Incident to the Enforcement of Motor Vehicle Laws.

The spot-check process is not the focus of general public concern. Police patrol cars are a common sight on the highways. One cannot expect to spend more than a few hours on the road without seeing a car pulled over by the police for one purpose or another. The motoring public accepts the police officer's role in enforcing motor vehicle laws. The requirement of a valid driver's license and vehicle registration is no less significant a motor vehicle law than is a speed limit or no-passing law.

Each of these laws must be enforced in order to provide for safe highway travel, and it is in recognition of this fact that the motoring public accepts the spot-check procedure. As this Court has already noted:

> ". . . [The] practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use." *Martinez-Fuerte, supra*, 428 U. S. n. 14 at 560.

D. The Random Spot-Check Is the Only Effective Means of Enforcing Driver's License and Vehicle Registration Laws.

The Supreme Court of Nebraska has held, "The only practical method of enforcing the licensing laws involved is by stopping the vehicle." *State v. Holmberg, supra*, 231 N. W. 2d at 675. Similarly, the Ninth Circuit has held that other than by a spot-check, "[n]o nother way was available to the officer to determine whether appellant possessed the required license," *Lipton v. United States, supra*, 348 F. 2d at 593, followed by the Supreme Court of North Carolina in *State v. Allen, supra*, 194 S. E. 2d at 14.

License and registration spot-checks are all the more effective because they directly monitor the activity in question—driving. This is in contrast to spot-checks conducted for some special purpose, *e.g.*, border patrol stops, *Brignoni-Ponce, supra,* 422 U. S. n. 8 at 883. The only reason why spot-checks are used to apprehend illegal aliens and those who exploit them is that the majority of illegal aliens enter this country by car and then rapidly disperse inland after crossing the border, *Id.* at 878-879. The most efficient way to catch them is to do it while they are close to the border and in vehicles. Despite the fact that the immigration laws serve a basically economic function with little connection to highway use, even they may be reasonably enforced by random checkpoint stops, *Martinez-Fuerte, supra,* 422 U. S. 543.

One of the major reasons why roving border patrol stops were prohibited absent reasonable suspicion, *Brignoni-Ponce, supra,* 422 U. S. 873, while permanent checkpoint stops were approved, *Martinez-Fuerte, supra,* 428 U. S. 543, was the finding that checkpoints are less intrusive but just as effective as roving stops. *Id.* 428 U. S. 558-559. While this finding is apt in connection with enforcement of immigration laws at or near the border, it is less useful where drivers are not forced to cross a fixed line. Permanent license and registration checkpoints in Delaware would simply be places to avoid. Lines of registered vehicles with licensed drivers would form at the checkpoints while the unregistered vehicles and unlicensed drivers would move by alternative routes. Unlicensed operators would be able to drive about with impunity, knowing that they would not be stopped unless they were actually observed driving erratically or were so foolish as to drive through a checkpoint.

The only other alternative is the temporary roadblock—a totally unworkable device in a major city and

hardly more effective on a country road. Moreover, there is nothing to suggest that an innocent driver coming upon a roadblock on a deserted, rural road would be any less alarmed or inconvenienced than a driver pulled over for a spot-check as was conducted in this case.[3]

II. The Intrusion to Motorists Caused by License and Registration Checks Is No More Than a Minor Inconvenience.

The inconvenience experienced by the individual motorist who is stopped for a routine license and registration check has been described variously as "quite limited", *Martinez-Fuerte, supra,* 428 U. S. at 558, "modest", *Brignoni-Ponce, supra,* 422 U. S. at 550, "relatively slight", *Holmberg, supra,* 221 N. W. 2d at 675, and "momentary", *Myricks, supra,* 370 F. 2d at 904; *Leonard, supra,* 496 S. W. 2d at 577.[4] Typically, a spot-check begins when a marked police car, using its revolving lights, signals a motorist to stop. After the police car and the motorist come to a halt, the uniformed officer approaches the stopped motorist on foot. When the police officer reaches the automobile, he

3. This line of reasoning is not meant to suggest that expedience is a substitute for reasonableness. We submit that when the full weighing process is applied to spot-checks they will be found constitutionally acceptable. However, less-restrictive-alternative arguments must be anticipated.

4. *United States v. Montgomery,* 561 F. 2d 875, 880 (D. C. Cir. 1977) holds:

> "The stop is not momentary; but leads to delay—several minutes—to complete a radio check for outstanding traffic warrants."

In this case no one contends that a police officer is permitted to continue to detain a motorist once the motorist produces a license and registration in the proper form. The spot-check envisioned here does not involve a radio check. It may well be that the "reasonable suspicion" standard set forth in *Terry, supra,* 392 U. S. at 29, should be applied in passing on the reasonableness of a license and registration check followed by a radio check.

asks for the operator's license and vehicle registration. If the two documents are in order, the motorist is allowed to proceed. The entire procedure should take no more than a minute or two. The motorist does not have to wait for other cars to be checked. Unless something tangible causes the police officer to suspect that criminal activity is in progress, the motorist will not be touched (frisked) or even asked to step out of his vehicle.

A. Random Spot-Checks Have Minimal Objective or Emotional Impact on Innocent Motorists.

Objectively, the motorist who is stopped for a spot-check experiences one intrusion—inconvenience. The motorist is delayed for a few minutes and must produce his license and vehicle registration. Brief delays, however, are inherent in traveling by automobile. Motorists are continuing delayed by traffic lights and traffic snarls. As much as they relish unimpeded travel, motorists also expect to arrive at their destinations safely. The occasional sacrifice of a few minutes is amply repaid by increased highway safety.

Even when viewed subjectively, random stops do not significantly intrude upon the sanctity of the individual. Seeing the "360°" light in the rear-view mirror may cause momentary anxiety and perhaps annoyance. However, being stopped in such a manner is hardly stigmatizing nor even frightening. Moreover, whatever momentary discomfort a traffic stop may cause is quickly dispelled when the police officer announces his purpose.

The minimal nature of the intrusion they cause is highlighted when traffic stops are compared to other seizures which have been held to be reasonable. Under *Terry, supra,* 392 U. S. 1, a suspect may be frisked in front

of his friends on a public street if he behaves "suspiciously." Under *Martinez-Fuerte, supra,* 428 U. S. 543, a motorist may be stopped and forced to show proof that he is entitled to be in this country simply because he drove up to a checkpoint miles from any border.

B. Spot-Checks Do Not Interfere With Any Reasonable Expectation of Privacy.

The expectation of privacy to which a person in an automobile is entitled is significantly less substantial than the expectation of a person at home, *Carroll v. United States,* 267 U. S. 132. Similarly, the right to be free from inquiry is significantly less substantial than the right to be free from search, *Martinez-Fuerte, supra,* 428 U. S. at 555-556.

It is not realistic to expect to be able to operate a vehicle on the open road without being subjected to the scrutiny of others. Any accident or breakdown will subject the motorist to public exposure. Even a traffic light presents an opportunity for a public encounter.

The invasion of privacy a spot-check entails involves nothing more than identifying ~~one~~self to a police officer. This intrusion does not begin to compare with the indignity of a strip-search, or a public frisk. Further, the intrusion is of a fleeting nature.

C. The Exact Correlation Between Traffic Stops and the Laws They Enforce, Reduces the Intrusiveness of Such Stops.

The significance of the direct relationship between spot-checks and driving cannot be overstated. The police conduct in question here had no other purpose than to enforce Delaware's traffic laws. Like all other drivers, the Respondent was continually bringing the traffic laws to

bear upon himself as he proceeded down the road. The connection between driving and the motor vehicle laws stands in sharp contrast to the connection between driving and the immigration laws.

The intrusion inherent in a traffic stop where the motorist must show proof that he is licensed to drive is minimal even when viewed in isolation. This minimal intrusion is reduced further when compared with the intrusiveness of a vehicle stop where the motorist is required to prove that he has a right to be in this country. Nevertheless, the latter is constitutionally acceptable. See, discussion of *Martinez-Fuerte, supra,* 428 U. S. 543, on p. 10.

III. The Important Governmental Interest in Public Safety, Advanced by Random Spot-Checks, Must Prevail When Balanced Against the Limited Intrusion of a Momentary Stop.

The issue before this Court is simply whether random spot-checks for license and vehicle registration are "reasonable." Naturally, the same conduct which is reasonable in one context may be totally unacceptable in another. Thus, the police conduct under review in this case as measured by its purpose and value, must be weighed against the personal infringement it causes in order to determine its reasonableness.

There can no longer be any argument about the state's significant interest in the enforcement of its laws and in the protection of its citizens' safety. It is also beyond dispute that random license and registration spot-checks advance these fundamental governmental interests both directly and as a deterrent.

The intrusion, on the other hand, involves nothing more than a delay of several minutes during which two documents, a driver's license and motor vehicle registration, must be produced. The stopped motorist is necessarily on a public street, where at least minimal visual and aural contact with other motorists is expected. Patrol cars are common sights deserving of no special concern. The environment surrounding this momentary detention, therefore, is both public and unforbidding.

When applying the appropriate balancing test it is clear that the police conduct is reasonable and hence constitutionally permissible. The only question remaining is whether the Court will reach a constitutional decision actually predicated upon balancing interests.

Several of the lower courts that have passed upon the constitutionality of spot-checks and found such practices unconstitutional, including the Delaware Supreme Court in this case, 382 A. 2d at 1364 (A28), have abandonded the balancing test. They have done this because they are concerned that the spot-checks will become a device to perpetuate discrimination or an excuse for "fishing expeditions" to find evidence of other crimes, c.f. *United States v. Montgomery,* 561 F. 2d 875, 883 (D. C. Cir. 1977); *Commonwealth v. Swanger,* Pa. 307 A. 2d 875, 879 (1973).

It is of controlling significance that in this case absolutely no allegation has been made that Respondent was stopped as a result of any improper motive on the part of the police officer. The spot-check here was random in the most positive sense of the word. To rule that random stops are unconstitutional simply because they may be abused in some situations not presently before the Court, is to say that "random" has no meaning and also is to concede that the Courts cannot recognize and condemn discrimination or harrassment when necessary.

When this Court decided *Terry v. Ohio, supra,* 392 U. S. at 14-15, it expressly recognized the potential for abusing the stop and frisk procedure approved there.

Nevertheless, the Court stood ready to counter any abuses that might have arisen.

In *Terry, Id.*, this Court eschewed "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never control." Nevertheless, the Delaware Supreme Court adopted what it termed "a rigid invalidity rule." 382 A. 2d at 1364 (A28). This Court has already held that such rigid rules ". . . may exact a high toll in human injury and frustration of efforts to prevent crime." *Terry, supra,* 392 U. S. at 15.

In closing, it would be regrettable to cast aside an effective, perhaps the most effective, means of enforcing laws designed to protect lives and, at the same time, place an additional burden on the state simply because of the theoretical possibility of discrimination.

CONCLUSION.

For the foregoing reasons, the decision of the Supreme Court of the State of Delaware and the order of dismissal entered in the Superior Court of the State of Delaware should be reversed.

Respectfully submitted,

RICHARD R. WIER, JR.,
CHARLES M. OBERLY, III,
CAROLYN BERGER,
FRED S. SILVERMAN,
KATHLEEN MOLYNEUX,
Counsel for Petitioner.

November, 1978

Appendix.

STATUTES INVOLVED

21 Del. C. § 2101 (1974). Operation of unregistered vehicle; exception:

> No person shall drive or move, nor shall any person, being the owner of a vehicle, knowingly permit to be driven or moved upon any highway any vehicle, except trackless trolley coaches of a type required to be registered hereunder, which is not registered and for which current registration plates have not been issued as provided in this chapter or for which the appropriate fees have not been paid when and as required by this chapter, except that when application accompanied by the proper fee has been made for registration and certificate of title for a vehicle, the same may be operated temporarily pending complete registration upon displaying a duplicate application duly verified or other evidence of such application or otherwise under rules and regulations promulgated by the Department.

21 Del. C. § 2118 (1974). Requirement of insurance for all motor vehicles registered in the State; penalty:

> (a) No owner of a motor vehicle registered in this State, other than a self-insurer pursuant to § 2906 of this title, shall operate or authorize any other person to operate such vehicle unless the owner has insurance on such motor vehicle providing the following minimum insurance coverage.

21 Del. C. § 2142 (1974). Purpose of inspections:

> Inspection shall be for the purpose of determining whether a vehicle is in a safe and fit condition to be

operated upon the highways of the State, and whether it is equipped in the manner provided by law.

21 Del. C. § 2143 (1974). Inspection of motor vehicle before registration; exception; vehicles outside state:

(a) Before the Department registers, renews the registration of, or reregisters a motor vehicle required to be registered under the provisions of this title, such vehicle shall first be inspected by the Department and determined to be safe and fit for operation and found equipped according to law. The Department may waive such inspection requirement with respect to the registration of new motor vehicles.

(b) Upon application, subject to approval by the Secretary, the Department may waive such inspection requirements with respect to the renewal of registration of a vehicle registered in this State which is not in this State at the time the inspection is required, provided that an out of state inspection, certified on forms prescribed by the Secretary, is submitted to the Department. It shall be the duty of the owner of any vehicle so inspected to submit such vehicle for inspection by the Department within 10 days after the vehicle is returned to this State.

(c) Upon application, subject to the approval by the Secretary, the Department may waive such registration requirements with respect to new or used motor vehicles where a fleet account is involved. A fleet account shall consist of 15 or more vehicles. The inspection requirements may be waived provided there are adequate inspection and repair facilities at the fleet headquarters. Such fleet account waiver shall not apply to fleets of school buses which transport pupils of any public, parochial or private school of the State.

21 Del. C. § 2701 (1974). Driving without a license; penalties:

No person shall drive a motor vehicle on a highway of this State without having been licensed as an operator or chauffeur under this chapter, unless expressly exempt from the licensing requirements. A person who is found in violation of this section shall for the first offense be punished by a fine of not less than $50 nor more than $200. For each subsequent like offense, he shall be fined not less than $100 nor more than $500 or imprisoned for a term not to exceed 6 months or both.

21 Del. C. § 2705 (1974). Persons exempt from licensing requirements:

(a) No person shall be required to obtain an operator's or chauffeur's license for the purpose of driving or operating a road roller, road machinery or any farm tractor or implement of husbandry temporarily drawn, moved or propelled on the highways.

(b) Every person in the service of the Army, Navy, Air Force or Marine Corps of the United States, and furnished with a driver's permit, shall be exempt from licensing under this chapter when operating an official motor vehicle in such service.

21 Del. C. § 2707 (1974). License qualifications:

(a) An operator's license shall not be issued to any person under the age of 16 years. A chauffeur's license shall not be issued to any person under the age of 18 years nor to any person 18 years of age or

older who has not had at least 1 year's previous experience as an operator of a motor vehicle.

(b) The Department shall not issue an operator's or chauffeur's license to any:

(1) Person whose license, either as an operator or chauffeur, has been suspended. during the period for which the license was suspended;

(2) Person whose license, either as operator or chauffeur, has been revoked under this chapter until the expiration of 1 year after such license was revoked;

(3) Person whom it has determined is an habitual drunkard or is addicted to the use of narcotic drugs;

(4) Applicant who has previously been adjudged mentally ill or an idiot, imbecile or feebleminded and who has not at the time of such application been restored to competency by judicial decree or released from a hospital for the mentally ill or feebleminded upon a certificate of the superintendent that such person is competent or then unless the Department is satisfied that such person is competent to operate a motor vehicle with safety to persons and property.

(5) Person when in the opinion of the Department such person is afflicted with or suffering such physical or mental disability or disease as will serve to prevent such person from exercising reasonable and ordinary control over a motor vehicle while operating the same upon the highways.

(6) Person who is unable to understand highway warning or direction signs in the English language;

(7) Person who is subject to losses of consciousness due to disease of the central nervous system, unless such person furnishes the Department with the certificate of 2 physicians duly licensed to practice medicine and surgery in this State that such person's infirmity is under sufficient control to permit him or her to operate a motor vehicle with safety to person and property. Each person licensed to operate a motor vehicle on the basis of such certificate shall furnish the Department with a new certificate each year not later than the anniversary date of the issuance of the license and not earlier than 45 days before said date which certificate shall show that on the basis of an examination within said period a physician duly licensed to practice medicine and surgery in this State has determined that the infirmity remains under sufficient control to permit the person to operate a motor vehicle with safety to person and property. Except as provided below, if such certificate is not received by the Department within 7 days after the anniversary date of the license, the Department shall revoke said license and shall notify its holder.

The above provision of this subparagraph notwithstanding, if 2 physicians duly licensed in this State furnish the Department with a certificate that the disease no longer requires treatment, and that the person can reasonably be expected to suffer no further losses of consciousness on its account, the Department may find

that the person need no longer submit annual certificates of his or her competence to operate a motor vehicle and shall notify the person accordingly. The Department may at its discretion retain medical consultants to advise it. No physician who examines a person and provides a certificate in good faith in accordance with this subparagraph shall be subject to any civil or criminal liability on account of having provided the certificate.

(8) Person who has not reached his 18th birthday and who has not successfully completed a course in driver education in a public or private high school in this State, such course having been approved by the State Board of Education and meeting the standards for such courses described by that Board.

21 Del. C. § 2713 (1974). Examination of applicants; waiver of examination:

(a) The Department shall examine every applicant for an operator's or chauffeur's license before issuing any such license, except as otherwise provided in subsections (b) and (c) of this section. The Department shall examine the applicant as to his physical and mental qualifications to operate a motor vehicle in such manner as not to jeopardize the safety of persons or property and as to whether any facts exist which would bar the issuance of a license under this chapter. Such examination shall not include investigation of any facts other than those directly pertaining to the ability of the applicant to operate a motor vehicle with safety, or other than those facts declared to be prerequisite to the issuance of a license under this chapter.

(b) The Department may in its discretion waive the examination of any person applying for the renewal of an operator's or chauffeur's license issued under this chapter.

(c) The Department may in its discretion issue an operator's or chauffeur's license under this chapter without examination to every person applying therefor who is of sufficient age, as required by § 2707 of this title, to receive the license applied for and who at the time of such application has a valid unrevoked license of like nature issued to such person under any previous law of this State providing for the licensing of operators or chauffeurs or to any person who at the time of such application has a valid unrevoked license of like nature issued to such person in another state under a law requiring the licensing and examination of operators and chauffeurs.

21 Del. C. § 2721 (1974). Duty to sign and carry license:

(a) Every person licensed as an operator or chauffeur shall write his usual signature with pen and ink in the spaces provided for that purpose on the license certificate and such license shall not be valid until the certificate is so signed.

(b) The licensee shall have such license in his immediate possession at all times when driving a motor vehicle and shall display the same upon demand of a uniformed police officer, justice of the peace, peace officer or motor vehicle inspector. It shall be a defense to any charge under this subsection if the person so charged produces in court an operator's or chauffeur's license theretofore issued to such person and valid at the time of his arrest.

21 Del. C. § 2732 (1974). Mandatory revocation of license:

(a) The Department shall forthwith revoke the license or driving privilege or both of any person upon receiving a record of the conviction of such person of any of the following crimes:

(1) Manslaughter resulting from the operation of a motor vehicle;

(2) The crime of assault in which a motor vehicle is used and the death of a human being results;

(3) Driving a vehicle while under the influence of intoxicating liquor or narcotic drug;

(4) Perjury or the making of a false affidavit to the Department under this chapter or any other law of this State requiring the registration of motor vehicles or regulating their operation on highways;

(5) Any crime punishable as a felony under the motor vehicle laws of this State or any other felony in the commission of which a motor vehicle is used;

(6) Conviction or forfeiture of bail upon 3 charges of reckless driving all within the preceding 12 months; but no license shall be revoked by reason of any conviction or convictions upon the charge of overloading any vehicle as provided in § 4503 of this title;

(7) A conviction of a driver of a motor vehicle involved in an accident resulting in the death or injury of another person upon a charge

of failing to stop and disclose his identity at the scene of the accident;

(8) A conviction of attempting to flee or or elude a police officer after having received a visual or audible signal from him as provided in § 4103(b) of this title.

(b) Upon receiving a record of the failure of a convicted person to pay a fine, costs or both as described in § 2731(b) of this title, the Department, or its succesor, shall (1) if the convicted person is a resident of this State, forthwith suspend his license until the fine, costs or both have been paid, and (2) if the convicted person is a nonresident of this State, forthwith suspend his driving privileges in this State and immediately advise the Motor Vehicle Administrator of the state wherein the convicted person is a resident that the convicted person has failed to pay a fine, costs or both due and owing to this State and requesting that the convicted person's license to drive be suspended until the fine, costs or both have been paid.

21 Del. C. § 2733 (1974). Discretionary suspension or revocation of license:

(a) The Department may immediately suspend the license and driving privileges or both of any person without hearing and without receiving a record of conviction of such person of crime whenever the Department has reason to believe that such person:

(1) Has committed any offense for the conviction of which mandatory revocation of license and driving privileges or both is provided in § 2732 of this title, but no license shall be suspended by reason of any conviction or convictions

upon the charge of overloading any vehicle as provided in § 4503 of this title;

(2) Has, by reckless or unlawful operation of a motor vehicle, caused or contributed to an accident resulting in death or injury to any other person or serious property damage;

(3) Is incompetent to drive a motor vehicle or is afflicted with mental or physical infirmities or disabilities rendering it unsafe for such person to drive a motor vehicle upon the highways;

(4) Is an habitual reckless or negligent driver of a motor vehicle or has committed a serious violation of the motor vehicle laws of this State;

(5) Has violated subdivision (2) of § 2741 of this title;

(6) Has violated § 6702 of this title.

Supreme Court, U. S.

DEC 27 1979

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-1371

DELAWARE,

Petitioner,

v.

WILLIAM J. PROUSE, III,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT

FRANK ASKIN
ERIC NEISSER
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, NJ 07102

CHARLES S. SIMS
c/o American Civil Liberties Union Foundation
22 East 40 Street
New York, NY 10016

DAVID M. LUKOFF
RICHARD E. FAIRBANKS, JR.
RICHARD M. BAUMEISTER
Assistant Public Defenders

LAWRENCE M. SULLIVAN
Defender
Public Defender of the State of Delaware
820 French Street
Wilmington, Delaware 19801

Attorneys for Respondent

PRESS OF BYRON S. ADAMS, INC., WASHINGTON, D.C.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS INVOLVED 2

QUESTIONS PRESENTED 3

STATEMENT OF THE CASE 3

SUMMARY OF ARGUMENT 4

ARGUMENT:

I. A DISCRETIONARY, CAPRICIOUS AND ARBITRARY STOP OF A MOTOR VEHICLE BY A ROVING POLICE PATROL WITHOUT ARTICULABLE SUSPICION VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION 7

A. Arbitrary Police Stops to Check Documents Inevitably Entail Significant Intrusions Upon Protected Constitutional Rights .. 8

B. The Constitution Precludes the Delegation of Unbridled Discretion to Police Officers in Areas Which Intrude Upon Fundamental Liberties. 17

1. Courts and commentators have consistently recognized the need for articulated standards and guidelines to guide the exercise of discretion by law enforcement officers in order to prevent abuse. 17

2. A rule which invalidates only those arbitrary car stops proven to be improperly motivated would not adequately address the dangers posed by unfettered police authority. 25

Page

II. THE STATE INTEREST IN ARBITRARY TRAFFIC STOPS BY ROVING POLICE PATROLS CONDUCTED AT AN OFFICER'S UNBRIDLED DISCRETION DOES NOT OUTWEIGH THE INDIVIDUAL'S RIGHT TO PERSONAL SECURITY FREE FROM ARBITRARY INTERFERENCE BY LAW OFFICERS. 28

A. The Interest in Traffic Safety is Not Sufficiently Weighty to Justify Arbitrary Traffic Stops Without Individualized Suspicion. 29

1. Documentary registration inspections are not an effective or necessary means of identifying unsafe vehicles. 35

2. Documentary license inspections are not an effective or necessary means of identifying unsafe drivers. 37

3. This Court has already identified less intrusive alternatives to arbitrary stops by roving patrols which would adequately protect the relevant societal interest 39

4. The interest in promoting respect for legal authority counsels against arbitrary police power. 45

III. THERE IS A POSSIBILITY THAT THE JUDGMENT OF THE COURT BELOW RESTED ON AN ADEQUATE AND INDEPENDENT STATE GROUND. 47

CONCLUSION 49

APPENDIX A 1a

APPENDIX B 1b

TABLE OF AUTHORITIES

Page

CASES:

Adams v. *Williams*, 407 U.S. 143, (1972). 9

Almeida-Sanchez v. *United States*, 413 U.S. 266 (1973) 23, 30, 44

Busby v. *United States*, 296 F.2d 328 (9th Cir. 1971), cert. denied, 369 U.S. 876 (1962) 12

Brinegar v. *United States*, 388 U.S. 160 (1949) 50

Camara v. *Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967) 21

Carroll v. *United States*, 267 U.S. 132 (1925) 16, 29, 44, 49

California v. *Krivda*, 409 U.S. 33 (1972) 49

Coates v. *Cincinnati*, 402 U.S. 611 (1971) 20

Collins v. *Smith*, 447 F.Supp. 676 (N.D. III. E.D. 1978). 20

Commonwealth v. *Swanger*, 435 Pa. 107, 307 A.2d 875 (1973). 11, 19, 25, 31

Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) 29, 32

Crandall v. *Nevada*, 73 U.S. (6 Wall.) 35 (1868) 16

Foley v. *Connelie*, 435 U.S. 291 (1978). 23

Gomez v. *Wilson*, 477 F.2d 411 (D.C. Cir. 1973). 20

Grayned v. *City of Rockford*, 408 U.S. 104 (1972) 20

Hall v. *United States*, 459 F.2d 831 (D.C. Cir. 1972). 20

Page

Hampton v. *Mow Sun Wong*, 426 U.S. 88 (1976) 37

Herb v. *Pitcairn*, 324 U.S. 117 (1945) 49

In re Toney C., 21 Cal. 3d 888 (1978) 27

Jankovich v. *Indiana Toll Road Comm'n*, 379 U.S. 487 (1955) 7, 49

Lewis v. *Hyland*, 554 F.2d 93 (3d Cir. 1977), cert. denied 434 U.S. 931 (1977) 23, 46

Long v. *District of Columbia*, 969 F.2d 927 (D.C. Cir. 1972) 45

Marshall v. *Barlow's, Inc.*,____ U.S. ____, 56 L.Ed.2d 305 (1978) 6, 21, 29, 42

Memorial Hospital v. *Maricopa County*, 415 U.S. 250 (1974) 16

Mental Hygiene Dept. v. *Kirchner*, 380 U.S. 194 (1965) 49

Michigan v. *Tucker*, ____ U.S. ____, 56 L.Ed.2d 486 (1978) 29

Mincey v. *Arizona*, ____U.S. ____, 57 L.Ed.2d 290 (1978) 29, 32

Murdock v. *City of Memphis*, 20 Wall. 590 (1875) 49

Ohio v. Gallagher, 425 U.S. 257 (1976) 49

Palmore v. *United States*, 290 A.2d 573, (D.C. Ct. App. 1972) 11, 25, 26, 31

Papachristou v. *City of Jacksonville*, 405 U.S. 156 (1972) 19, 20, 27

Pennsylvania v. *Mimms*, 54 L.Ed.2d 331 (.977) 12, 13

Page

People v. *Ingle*, 36 N.Y.2d 413, 369 N.Y.S. 2d 67, 330 N.E.2d 33 (1975) 19

People v. *McGaughran*, 47 U.S.L.W. 2336 (Cal. Sup. Ct., Oct. 6, 1978) 13, 14

People v. *Superior Court, County of Los Angeles*, 436 P.2d 1025 (Cal. 1976) 35

Ricks v. *District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968) 20

See v. *City of Seattle*, 387 U.S. 541 (1967) 21

Schaffer v. *State*, 184 A.2d 689 (Del.Sup.Ct. 1962) 48

Shapiro v. *Thompson*, 394 U.S. 618 (1969) 16

Smith v. *Florida*, 405 U.S. 172 (1972) 20

Smith v. *Goguen*, 415 U.S. 566 (1974) 20

South Dakota v. *Opperman*, 428 U.S. 364 (1976) 49

State v. *Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973) 12

State v. *Bonds*, 577 P.2d 781 (Haw. Supr.Ct. 1978) 5, 19, 25

State v. *Moore*, Del. Super. 187 A.2d 807 (1963) 48

State v. *Ochoa*, 23 Ariz. App. 510, 534 P.2d 441 (1975); rev'd on other grounds, 112 Ariz. 582, 544 P.2d 1097 (1976) 31, 35

State v. *Prouse*, Del. Supr. 382 A.2d 1359 (1978) 1, 4, 8, 18, 25

Terry v. *Ohio*, 392 U.S. 1 (1968) 5, 9, 11, 27, 31, 42, 45

The Passenger Cases, 48 U.S. (7 How.) 283 (1849) 16

Page

Thornhill v. *Alabama*, 310 U.S. 88 (1940) 20

United States v. *Brignoni-Ponce*, 422 U.S. 873 (1975) 4, 8, 9, 11, 16, 19, 23, 28, 29, 30, 34, 43

United States v. *Chadwick*, 433 U.S. 1 (1977)..... 32

United States v. *Craemer*, 555 F.2d 594 (6th Cir. 1977)..... 43

United States v. *Doran*, 482 F.2d 929 (9th Cir. 1973)..... 43

United States v. *Guest*, 383 U.S. 745 (1966) 5, 16

United States v. *Harflinger*, 436 F.2d 928 (8th Cir. 1970), cert. denied 402 U.S. 973 (1971)..... 12

United States v. *Lopez*, 328 F.Supp. 1077 (E.D.N.Y. 1971)..... 43

United States v. *Martinez-Fuerte*, 428 U.S. 543 (1976) 4, 8, 9, 10, 11, 15, 19, 23, 30, 34, 37, 43

United States v. *Montgomery*, 561 F.2d 875 (D.C. Cir. 1977)..... 10, 11, 13, 16, 17, 18, 19, 25, 31

United States v. *Ortiz*, 422 U.S. 891 (1975)..... 9, 10

United States v. *Ramsey*, 431 U.S. 606 (1977) 32

Walz v. *Tax Commission*, 397 U.S. 664 (1970) . 43, 44

Wolf v. *Colorado*, 338 U.S. 25 (1949)..... 21

CONSTITUTIONAL PROVISIONS

Fourth and Fourteenth Amendments..... *passim*

Delaware Constitution of 1897, Article I, Section 6 2

Page

OTHER AUTHORITIES:

ABA Project on Standards for Criminal Justice (1972), *Standards Relating to the Urban Police Function* 6, 22

Amsterdam "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349 (1974) 21

Bacigal, "Some Observations and Proposals on the Nature of the Fourth Amendment," 46 G.W.L. Rev. 529 (1978)..... 25

Bogomolny, "Street Patrol: The Decision to Stop a Citizen," 12 Crim. L. Bull. 544 (1976)... 46, 10a

Case Note, "Fourth Amendment Precludes Driver's License Inspection Vehicle Stops Not Based on Reasonable Suspicion or Made Pursuant to Random Selection Scheme," 24 Wayne L. Rev. 1123 (1978) 24

Davis, "An Approach to Legal Control of the Police," 52 Texas L. Rev. 703 (1974) 24

Davis, *Police Discretion* (1975) 23, 24

Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, 4th ed., Vol. 1, Law School Edition (Little, Brown & Co. 1976)..... 16

Heusenstamm, "Bumper Stickers and the Cops," *Transaction Magazine*, Feb. 1971..... 26

National Advisory Commission on Criminal Justice Standards and Goals: Police, Standard 9.6 Traffic Operations..... 33

National Advisory Commission on Criminal Justice Standards and Goals: Police 230 (1973) 38

Page

Note, "Automobile License Checks and the Fourth Amendment," 60 Va.L.Rev. 666 (1974) 11, 12, 25

Selltiz, Jahoda, Deutsch, Cook, *Research Methods in Social Relations*, 99 (1961) 17

Yount, A., *Vehicle Stops Manual* (1976) 13

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 77-1571

DELAWARE,

Petitioner,

v.

WILLIAM J. PROUSE, III,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Delaware

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Supreme Court of the State of Delaware appears as *State* v. *Prouse*, Del.Supr., 382 A.2d 1359 (1978) (A20). The opinion of the Superior Court of the State of Delaware (A16) is not reported.

JURISDICTION

The opinion of the Supreme Court of the State of Delaware was filed on February 1, 1978, and the mandate of that court was issued February 13, 1978. The

petition for certiorari was timely filed on May 2, 1978, and was granted on October 2, 1978. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

However, the opinion of the Supreme Court of the State of Delaware is ambiguous as to whether the judgment rests upon the Fourth and Fourteenth Amendments to the United States Constitution or upon the Delaware Constitution,[1] or both. Consequently, jurisdiction may not lie in this Court because of the possible existence of an independent and adequate state ground for the judgment below.[2]

CONSTITUTIONAL PROVISIONS INVOLVED

In addition to the Constitutional provisions noted by the State, the following provision of the Delaware Constitution is also involved:

> The people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and no warrant to search any place, or to seize any person or thing, shall issue without describing them as particularly as may be; nor then, unless there be probable cause supported by oath or affirmation. Delaware Constitution of 1897, Article I, § 6.

[1] Del.Const., art I, § 6 Del. Code Ann. (1897).
[2] See Point III, *infra*.

QUESTION PRESENTED

Does a discretionary and arbitrary stop of a motor vehicle by a roving police patrol without articulable suspicion violate the and Fourth Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Defendant adopts the State's statement of the case with the following additions.

Patrolman Anthony Avena testified that he stopped Defendant only because Defendant's car was in the area and the patrolman was not answering any other complaints. He described the stop as "more or less a routine check, basically just to check the driver's license and registration." (A7-8). He had observed no traffic violations or other criminal activities, and he conceded that there was nothing suspicious about Defendant's car. (A10). Patrolman Avena characterized the stop as "random," saying, "I saw the car in the area and was not answering any complaints so I decided to pull them off." (A9). He said that he did not "make such stops a habit," (A9), although he had conducted such document check stops before.

Patrolman Avena also testified that neither the New Castle County Police Department, nor the Office of the Attorney General of the State of Delaware had established any procedures, standards, or guidelines authorizing or governing the stop of a motor vehicle

to check license and registration documentation. (A12).

The trial court granted Defendant's motion to suppress evidence seized as a result of the stop. The Delaware Supreme Court reserved the question of the constitutionality of non-arbitrary, systematic roadblock stops,[1] but affirmed suppression of evidence seized during the arbitrary, suspicionless stop of Defendant by a roving police patrol:

> Because we are of the opinion that non-systematic stops by police, who have no reasonable suspicion that a legal violation has occurred, violate Federal and State constitutional guarantees, we affirm the Superior Court order and dismiss the appeal.
>
> *State* v. *Prouse*, Del. Supr., 382 A.2d 1359, 1361 (1978)(A21).

SUMMARY OF ARGUMENT

A police stop of a motor vehicle travelling public roads to question its occupants is a "seizure" within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution and, thus, must be justified by the state as not "unreasonable." *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975); cf. *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976). The reasonableness of such a seizure depends

[1] *State* v. *Prouse*, 382 A.2d 1359, 1362 (1978) (A23).

upon the balance between the governmental interest alleged to justify it, and the individual's right to personal autonomy and security free from arbitrary interference by police officers, *Brignoni-Ponce*, *supra*, as further augmented by the citizen's interest in freedom of travel, *United States* v. *Guest*, 383 U.S. 745 (1966). Where a stop by a roving police patrol is based solely on the whim of the patrolman, and there are no articulable facts to lead the officer to believe that a law has been violated or that the vehicle poses a threat to public safety, the stop is constitutionally indefensible. *United States* v. *Brignoni-Ponce*, *supra*; cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968).

This case does not pose the question whether or not truly random spot-checks could pass constitutional muster. The spot-check in this case arose from the subjective decision of "an officer to single out one among many automobiles for investigation, with no cause to believe that a violation of a law was taking place and nothing to show that the decision was guided by any standard which prevented it from being purely arbitrary." *State* v. *Bonds*, 577 P.2d 781, 784 (Haw. Supr. Ct. 1978).

The damage to personal liberty caused by such intrusive and arbitrary police behavior is substantial. This Court has long recognized the dangers inherent in the allocation of unfettered discretion to law enforcement officers, and has therefore required specificity of regulation wherever law enforcement interests intrude upon rights of personal liberty. See, *e.g.*,

Marshall v. *Barlow's, Inc.*, ___ U.S. ___, 56 L.Ed.2d 305 (1978).

Defendant does not deny the need for the exercise of professional discretion by police officers in the widely varying circumstances that arise on the beat or on the highway. But, as Chief Justice Burger has noted, there must be "carefully devised basic standards to guide the exercise of this discretion. . . ."[4] Where policemen are allowed unfettered authority to stop persons for questioning, they are likely to focus the greater part of their attention upon those whom they identify with population groups or personality traits which they disfavor.[5] As this Court has held, such abuse can only be avoided either by a system which requires police to have articulable reasons for stopping one particular vehicle rather than another, or by a truly random system of selection which limits the influence of caprice, prejudice, and bias.

The state's interest here does not require variance from that standard. While the public interest in keeping unsafe drivers and unsafe vehicles off the road is substantial, that interest is not significantly served by arbitrary stops of law-abiding motorists based on nothing more than a police officer's whim or caprice. The interest asserted by the state can be equally or

[4] Quoted in "Standards Relating to the Urban Police Function," American Bar Association Project on Standards for Criminal Justice, p. 2 (1972).

[5] This common sense assessment is extensively supported by scientific literature, which is set forth in Appendix A, infra.

better served by means less destructive of personal rights.

Finally, there is a strong possibility that the judgment below rests upon an adequate and independent state ground, which counsels dismissal of the writ of certiorari as improvidently granted, *Jankovich* v. *Toll Road Comm'n*, 379 U.S. 487 (1955), or remand to the Delaware Supreme Court for clarification of the ground for its decision.

ARGUMENT

I. A DISCRETIONARY, CAPRICIOUS AND ARBITRARY STOP OF A MOTOR VEHICLE BY A ROVING POLICE PATROL WITHOUT ARTICULABLE SUSPICION VIOLATES THE FOURTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Whether the discretionary stop of Defendant by a roving police patrol, without any articulable suspicion, and made pursuant to no rules, guidelines, procedures, or other specific neutral criteria, is reasonable within the meaning of the Fourth Amendment depends on a balance between the individual interests infringed and the public interest. On the facts of this case, that balance must be struck in favor of the Defendant. The stop at issue violated rights of privacy, autonomy, security, and free passage, and if sanctioned would permit every person travelling the public

roads in our nation to be stopped without any cause shown. On the other hand, the state has not demonstrated that the stops it defends are necessary, or effective, or that less intrusive measures are not available to meet its interests.

A. Arbitrary Police Stops to Check Documents Inevitably Entail Significant Intrusions Upon Protected Constitutional Rights.

This case involves the arbitrary stop[6] of a motor vehicle by a roving police patrol without any articulable suspicion[7] that a law was violated, or that the vehicle was being operated in an unsafe manner. The sole purpose of the stop was to conduct a driver's license and motor vehicle registration documents check. Such a stop is clearly a "seizure" within the meaning of the Fourth and Fourteenth Amendments to the United States Constitution and consequently the Fourth Amendment requires that such seizure be reasonable. *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 556 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). All forms of "seizure," including a brief detention for the purpose of question-

[6] *State* v. *Prouse*, Del. Supr., 382 A.2d 1359, 1364 (1978) (A28).

[7] The Delaware Supreme Court would not require a showing of "probable cause" in order to find such stops constitutionally permissible, *State* v. *Prouse*, *supra* (A28), and Defendant does not quarrel with that holding for purposes of this case.

ing, are subject to constitutional scrutiny whether the individual is accosted on foot, *Terry* v. *Ohio*, *supra* at 16, seated in a parked automobile, *Adams* v. *Williams*, 407 U.S. 143, 146, (1972), or driving a motor vehicle down a highway, *United States* v. *Martinez-Fuerte*, 428 U.S. at 556; *United States* v. *Brignoni-Ponce*, 422 U.S. at 878.

Roving stops of individuals driving in conformance with the law necessarily entail substantial intrusions upon significant Fourth Amendment interests: the "right to free passage without interruption," *United States* v. *Martinez-Fuerte*, 428 U.S. at 557-58; the "right to personal security," *United States* v. *Brignoni-Ponce*, 422 U.S. at 878; and the right to privacy, *Terry* v. *Ohio*, 392 U.S. 1, 9 (1968).[8] At a minimum, a document check involves interference with travel and the personal activities for which it is undertaken—commencing work on time, visiting a hospitalized friend, appearing in court or going to church. This interference is typically effected by the red, flashing light and wailing siren of a previously unnoticed moving car, which this Court has already recognized as one of the the most unsettling and frightening forms of governmental intrusion. *United States* v. *Ortiz*, 422 U.S. 894, 895-95 (1975).[9] The individual inevitably feels the anxiety of wondering "What have I done?",

[8] In the classic formulation of the right to privacy, Warren and Brandeis defined it quite simply as "the right to be let alone." 4 Harv. L. Rev. 193 (1890).

[9] "[The] Fourth Amendment's requirement that searches and seizures be reasonable also may limit police use of unnecessarily

the fear of "What will he do to me?", and the annoyance or outrage at being stopped and singled out in public "When I haven't done anything."[10]

Next, the officer will approach and conduct a visual inspection of the interior of the car and its occupants. This visual scrutiny is followed by oral interrogation, and even at this point there is no assurance that the officer will assuage the citizen's fears by explaining the limited purpose of the stop[11].

---

frightening or offensive methods of surveillance and investigation." *United States* v. *Ortiz*, 422 U.S. 891, 895 (1975). In authorizing systematic roadblock—as opposed to roving patrol—stops for inquiries by the Border Patrol regarding one's status in the country, this Court has held that "the subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." *United States* v. *Martinez-Fuerte*, *supra* at 558.

[10] The Court has recognized the psychological impact of "stigmatizing" those selected from the flow of traffic. *Martinez-Fuerte*, *supra* at 560. Yet it discounted the effect there because of "the public and relatively routine nature" of the roadblock procedure which led to the stigma. Here the stops will inevitably be, in the Court's words, "frightening or offensive," *ibid.*, thus intensifying the subjective sense of stigmatization. Objectively, too, singling one out from the flow of unimpeded traffic suggests more wrongdoing to others than a secondary referral at a public roadblock where everyone expects to be stopped—and some may be pulled aside simply because they do not have the documents immediately available.

[11] Recognizing the inherently frightening nature of a roving stop and the need to reassure citizens even before the officer's first contact, the District of Columbia police instituted the unique requirement that the stopping officers hand the retained motorists a signed, printed departmental form entitled, "What This Spot Check Means to You." *United States* v. *Montgomery*, 561 F.2d 875, 883, n. 8 (D.C. Cir. 1977)

Even if such discretionary stops were thus limited, existing case law would still condemn them absent a showing of reasonable suspicion. *United States* v. *Martinez-Fuerte*, 428 U.S. at 558-59; United States v. *Brignoni-Ponce*, 422 U.S. at 882-883. Cf. *Terry* v. *Ohio*, 392 U.S. 1 (1968). Moreover, experience confirms that traffic stops are hardly ever limited to a mere examination of documents. *Note*, "Automobile License Checks and the Fourth Amendment," 60 Va. L.Rev. 666, 672 (1974). Although the State claims that the "entire procedure should take no more than a minute or two" if the documents are in order (Pet. Brief at 12), it has adduced no evidence as to the actual time such stops involve. In fact, documentary checks must inevitably take substantially longer.

First, a document check will typically be conducted by two officers. One will approach the passenger side and keep the occupants and the interior of the car under constant surveillance while the other approaches the driver to inquire regarding license and registration. *Note*, *supra*, 60 Va.L.Rev at 672; *Palmore* v. *United States*, 290 A.2d 573, 58 (D.C. Ct. App. 1972); *United States* v. *Montgomery*, 561 F.2d 875, 880 n.4 (D.C. Cir. 1975). See also *Commonwealth* v. *Swanger*, 453 Pa. at 109, 307 A.2d at 876. Rather than a minimal intrusion of the privacy of the driver, there is an intensive and deliberate visual inspection of the interior of the vehicle and all its occupants.

Second, some police departments find it preferable, for safety reasons, to order occupants out of the car

even during a document check. See *United States* v. *Harflinger*, 436 F.2d 928, 933 (8th Cir. 1970), *cert. denied*, 402 U.S. 973 (1971); *Busby* v. *United States*, 296 F.2d 328, 330 (9th Cir. 1971), *cert. denied*, 369 U.S. 876 (1962); *State* v. *Allen*, 282 N.C. 503, 194 S.E. 2d 9 (1973); *Note*, *supra*, 60 Va.L.Rev. at 672 n. 31. Such an order not only prolongs the interference with travel, but significantly increases all forms of intrusion:

> A woman stopped at night may fear for her safety; a person in poor health may object to standing in the cold or rain; another who left home in haste to drive children or spouse to school or to the train may not be fully dressed; an elderly driver who presents no possible threat of violence may regard the police command as nothing more than an arrogant and unnecessary display of authority.
>
> *Pennsylvania* v. *Mimms*, 54 L.Ed.2d 331, 343 (1977) (Stevens, J., dissenting).

This court held in *Mimms* that this "incremental intrusion resulting from the request to get out of the car" does not itself violate the Fourth Amendment "*once the vehicle was lawfully stopped*" for a motor violation. *Id.* at 336.[12] (emphasis added). Nevertheless, this substantial additonal intrusion is yet another factor in evaluating the impact upon personal interests of approving arbitrary motor vehicle stops by roving police patrols.[13]

[12] The stop in *Mimms* was prompted by a routine patrol's observation of an expired license plate indicated an unregistered motor vehicle. *Id.* at 334. It is precisely this type of observation of specific articulable fact which Defendant contends is the minimum constitutional predicate for a document check stop.

Third, some departments provide for a routine computer check for criminal warrants, license suspensions, or car thefts, entailing a still greater delay. *People* v. *McGaughran*, 47 U.S.L.W. 2336 (Calif. Sup. Ct., October 19, 1978); *United States* v. *Montgomery* *supra*, 56 F.2d at 880, 883 nn. 8 and 9.[14] In *McGaughran*, for example, the initial warrant check took 10 minutes and the final confirmation of the warrants required an additional 20-25 minutes, 47 U.S.L.W. at 2336, thus lengthening the detention time and further stigmatizing and unsettling the accosted individual.

[13] As Justice Stevens noted in *Mimms*, some police authorities argue that the safer course is not to allow the driver out of the car, a restraint on liberty hardly less significant:

> If the suspect attempts to exit his vehicle, the officer should push the door closed, lock it, if possible, and tell the driver to "please stay in the car!" Then he should request [the] identification he desires and request the violator to hand the material out of the window away from the vehicle. The officer should not stare at the identification but [should] return to his vehicle by backing away from the suspect car. As the patrolman backs away, he should keep his eyes on the occupant(s).

Pennsylvania v. *Mimms*, *supra*, 54 L.Ed.2d at 342 n. 10 (Stevens, J., dissenting), quoting from A. Yount, *Vehicle Stops Manual* 2-3 (1976). Locking the individual in the car increases the objective limitation on movement and heightens dramatically fear and shock.

[14] The official form handed to stopped motorists in the District of Columbia acknowledges that one of the purposes of the spot check is "to combat the extensive stolen auto problem." *United States* v. *Montgomery*, 561 F.2d at 883 n. 9.

For these reasons, the California Supreme Court has invalidated the routine use of warrant checks even for those individuals directly observed by police to violate traffic safety laws. *People* v. *McGaughran*, *supra* at 2337.[15]

In light of these facts, the State's undemonstrated contention that document checks would only last "a minute or two" is dubious, and an extremely weak basis on which to justify abridging the Fourth Amendment interests of every driver in America. Although the State suggests that the "reasonable suspicion" standard would govern a document stop followed by a radio check for outstanding traffic warrants (Pet. Brief at 11 n. 4), it ignores the fact that the *only* way to verify the continuing validity of facially adequate licenses and registrations is to conduct a radio check to ensure that they have not been suspended or revoked. Thus, a driver whose documents are fully in order will necessarily be subjected to an intrusion lasting more than a "minute or two," unless the State means to say that traffic safety will be promoted simply by having motorists carry certain pieces of paper *regardless* of whether they are legally valid.[16] In fact, if the State is serious about promoting

[15] The individual was stopped for driving in the wrong direction on a one-way street. *People* v. *McGaughran*, 4 U.S.L.W. at 2336.

[16] Delaware law provides for discretionary or mandatory revocation or suspension of drivers' licenses as a result of a history of traffic offenses. 21 *Del. C.* §§ 2732, 2733. Because notice of revocation or suspension may be accomplished by mail, 21 *Del.C.* § 2736, there is no guarantee that a driver whose license has been suspended will have physically surrendered that license to the issuing authority.

traffic safety through license and registration checks, the only driver who will be subjected to a radio check is the one who has no license, or who presents one which is invalid on its face.

Finally, arbitrary car stops will inevitably intrude upon the privacy and liberty of wholly innocent automobile passengers, who bear no responsibility whatever for complying with license or registration laws. These innocent by-standers will not only be subjected to the frightening interference with autonomy and discomfiting visual scrutiny which inevitably attend any car stop, but they may also be interrogated, *Martinez-Fuerte*, ordered out of the car, *Mimms*, or even subjected to a warrant check, *McGaughran*. Car stops must only be permitted upon the basis of some articulable, individualized reasonable suspicion in order to minimize these significant and wholly unjustified intrusions upon the personal Fourth Amendment rights of automobile passengers.

Arbitrary stops by roving police patrols not only intrude rights of personal automony, security, and privacy protected by the Fourth and Fourteenth Amendments, but also seriously impinge upon "one's right to travel." *United States* v. *Martinez-Fuerte*, 428 U.S. at 560 n. 14 (1976), "which has long been recognized as a basic right under the Constitution."

United States v. *Guest*, 383 U.S. 745, 758 (1966). See also *Carroll* v. *United States*, 267 U.S. 132, 154 (1925); *The Passenger Cases*, 48 U.S. (7 How.) 283, 492 (1849); *Crandall* v. *Nevada*, 73 U.S. (6 Wall.) 35, 48, 49 (1868). Judicial approval of the practice at issue will subject motorists to "potentially unlimited interference with their use of the highways." *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 882. See also *United States* v. *Montgomery*, 561 F.2d 875, (D.C. Cir. 1977).[17]

Freedom of travel "is not a mere conditional liberty subject to regulation and control under conventional due process or equal protection standards. . . . [I]t is a virtually unconditional personal right. . . ." *Shapiro* v. *Thompson*, 394 U.S. 618, 642-43 (1969) (Stewart, J., concurring). To uphold its restriction based on nothing more than the whim or caprice of a police officer is to reduce that right to a "mere conditional liberty."

[17] While the cases before this Court have all involved the right of *inter*state travel, *compare Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 255 (1974), the lower federal courts "have been virtually unanimous in holding or assuming that intrastate travel has the same protection as interstate travel." Emerson, Haber & Dorsen, *Political and Civil Rights in the United States*, 4th ed., Vol. 1, Law School Edition p. 698-99 (Little, Brown & Co. 1976). Indeed, in the first articulation of the right to travel in this Court, Chief Justice Taney commented that Americans must be allowed to travel between the states "as freely as in our own states," implying that the former right is derivative of the latter. *The Passenger Cases*, *supra*, 7 How. at 492.

B. The Constitution Precludes the Delegation of Unbridled Discretion to Police Officers in Areas Which Intrude Upon Fundamental Liberties.

1. Courts and commentators have consistently recognized the need for articulated standards and guidelines to guide the exercise of discretion by law enforcement officers in order to prevent abuse.

The intrusion into personal autonomy described in the preceding section would exist even if the targets of stops by roving patrols were selected in a truly random way[18] beyond the control of the individual police officer. However, where the targets of the stop are selected arbitrarily, the potential for abuse is greatly enhanced.

In its decision, the Supreme Court of Delaware recognized the legitimate state interest in enforcing li-

[18] Petitioners refer to the type of stop involved in this case as "random." It is, of course, not random at all. Randomness involves a procedure that gives "each subject the same chance as that of any other subject of being assigned to any given condition. The procedures are such that any selection based, either consciously or unconsciously, on the investigator's judgment is ruled out." Selltiz, Jahoda, Deutsch, Cook, *Research Methods in Social Relations* 99 (1961). *Compare United States* v. *Montgomery*, 561 F.2d 875, 884 (D.C. Cir. 1977):

> The important point is that the stops be made in some *systematic* fashion, prescribed in advance by superiors.
>
> Stops are not random simply because they are left to the officer's discretion (emphasis in original).

censing and registration laws, (A27), but refused to condone this arbitrary stop by a roving police patrol:

> [T]he factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedures. The flaw in the process is that absolute discretion and authority is conferred upon the police to detain whomever they desire for whatever reason on the pretense of a documents check stop. Thus an officer prejudiced against any visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possibility of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures could be practiced with little or no chance for judicial review.

State v. *Prouse*, 382 A.2d at 1364 (A27-28). See also *United States* v. *Montgomery*, 561 F.2d 875 (D.C Cir. 1977).

It also carefully limited its holding:

> The issue of the legal validity of systematic, roadblock-type stops of a number of vehicles for license and vehicle registration check is *not* now before the Court. Systematic stopping procedures entail limited exercise of discretion concerning which vehicles to stop, and, therefore, pose legal issues different in nature from those presented by the random stop practice challenged here. *State* v. *Prouse*, 382 A.2d at 1362 (A23) (emphasis in the original).

Other jurisdictions which have found arbitrary document check stops by roving police patrols unreasonable have likewise reserved judgment on the question of the constitutionality of systematic roadblock stops. See, *e.g.*, *United States* v. *Montgomery*, *supra* at 838; *State* v. *Bonds*, 577 P.2d 781, 784 (Haw. 1978); *People* v. *Ingle*, 36 N.Y.2d 413, 369 N.Y.S.2d 67, 330 N.E. 2d 33 (1975); *Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875, 877 n. 3 (1973). Compare *United States* v. *Brignoni-Ponce*, *supra*, with *United States* v. *Martinez-Fuerte*, *supra*.

Discretion is an essential aspect of good law enforcement. It gives police officers the ability to exercise flexibility in the enforcement of law and deterence of crime. When used properly, discretion is a positive force which not only adds to the effectiveness of the police officer but also can operate to improve community-police relations.

However, this Court has long recognized the dangers inherent in the allocation of unfettered and unregulated discretion to public officials in the area of law enforcement. As a unanimous court held in *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 170 (1972), overturning a vagrancy ordinance as unconstitutional:

> Where. . .there are no standards governing the exercise of the discretion. . .the scheme permits and encourages an arbitrary and discriminatory enforcement by local prosecuting officials,

against particular groups deemed to merit their displeasure.

Thornhill v. *Alabama*, 310 U.S. 88, 97-98 (1940).

See also, *e.g.*, *Smith* v. *Goguen*, 415 U.S. 566, 574-75 (1974); *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-09 (1972); *Coates* v. *Cincinnati*, 402 U.S. 611, 614 (1971).[19]

It was precisely the evil of arbitrary discretion, as exercised by British agents using general warrants,

[19] This principle is part of this Court's void-for-vagueness doctrine, which is used, *inter alia*, to limit police discretion. See Amsterdam, "The Void for Vagueness Doctrine." 109 U.Pa.L.Rev. 67 (1960). The doctrine requires legislators to

> set reasonably clear guidelines for law enforcement officials and triers of fact in order to prevent "arbitrary and discriminatory enforcement."

Smith v. *Goguen*, 415 U.S. 566, 574 (1974). The courts have frequently overturned vagrancy or loitering statutes as void for vagueness, because such laws define the crime so generally that the actual definition becomes purely the subjective opinion of an individual law enforcement officer. *Papachristou*, *supra*, 405 U.S. at 170; *Smith* v. *Florida*, 405 U.S. 172 (1972); *Thornhill* v. *Alabama*, 310 U.S. 88, 97-98 (1940); *Hall* v. *United States*, 459 F 2d 831, 837 (D.C. Cir. 1972) (en banc); *Ricks* v. *District of Columbia*, 414 F.2d 1097 (D.C. Cir. 1968). Vague laws are easily used by police officers to harass particular individuals or classes of people of whose behavior they disapprove, *Papchristou*, *supra*, 405 U.S. at 170; *Gomez* v. *Wilson*, 477 F.2d 411, 427 (D.C. Cir. 1973) (Bazelon, C.J., concurring in part, dissenting in part), to get those people off the streets whom the police believe have committed another crime for which there is insufficient evidence to obtain a conviction, *Hall* v. *United States*, 459 F.2d 831, 836 (D.C. Cir. 1972) (en banc), and in general to "enforce [the law] according to their [the police's] personal prejudices." *Collins* v. *Smith*, 447 F.Supp. 676, 691 (N.D. Ill. E.D. 1978).

which gave rise to the Fourth Amendment.[20] Its restriction against unreasonable searches and seizures has consistently been enforced to prevent the abuse of discretion by all law enforcement officials, and warrantless administrative searches have been specifically forbidden because of the great danger of abuse. *See* v. *City of Seattle*, 387 U.S. 541 (1967); *Camara* v. *Municipal Court of the City and County of San Francisco*, 387 U.S. 523 (1967). Last Term, this Court again restricted warrantless inspections by agents enforcing standards of the Occupational Safety and Health Act (OSHA) because a warrantless search "devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field." A warrant ensures that a "neutral officer" has decided that the "inspection is reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria." *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 323 (1978).

Arbitrary decision-making by police officers is at least as dangerous as arbitrary decision-making by administrative agents. Protection of citizens "against intrusion by the police" is "at the core of the Fourth Amendment." *Wolf* v. *Colorado*, 338 U.S. 25, 27

[20] See Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349, 366 (1974).

(1949). Chief Justice Burger has articulated the critical need for regulation of police discretion:

> It is often overlooked that no public officials in the entire range of modern government are given such wide discretion on matters dealing with the daily lives of citizens as are police officers. . .The policeman on the beat, or in the patrol car, makes more decisions and exercises broader discretion affecting the daily lives of people, every day and to a greater extent, in many respects, than a judge will ordinarly exercise in a week. . .
>
> No law book, no lawyer, no judge can really tell the policeman on the beat how to exercise this discretion perfectly in everyone of the thousands of different situations that can arise in the hour-to-hour work of the policeman. Yet we must recognize that we need not choose between no guidelines at all and perfect guidelines. There must be some guidance by way of basic concepts that will assist the officer in these circumstances.
>
> Basically, as I suggested, it is a matter of common sense, and sound judgment, and yet we know that one man's common sense may be another man's mistake. Hence this need for carefully devised basic standards to guide the exercise of this discretion and, second, for careful and comprehensive training of officers before they are thrust into situations that often baffle the wisest judge.[21]

[21] Address to a class of local and state police administrators on their graduation from the FBI Academy, quoted in *Standards Relating to the Urban Police Function*, ABA Project on Standards for Criminal Justice, 2 (1972).

See generally, Davis, *Police Discretion* (1975); cf. *Foley* v. *Connelie*, 435 U.S. 291, 297-300 (1978).

The possibility of abuse of discretion resulting from the lack of neutral standards is particularıy real in unsupervised encounters between police and motorists on the highway:

> The search in the present case was conducted in the unfettered discretion of the members of the Border Patrol, who did not have a warrant, probable cause, or consent. The search thus embodied precisely the evil the Court saw in *Camara* when it insisted that the discretion of the official in the field be circumscribed. . . *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973).

In later border patrol cases involving stopping cars to question occupants about their citizenship, this Court again recognized "the grave danger" that unfettered discretion "would be abused by some officers in the field." *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559 (1976); citing *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 882-83 (1975).[22]

[22] As an illustration of the dangers of unregulated discretion by highway patrolmen, see the District Court's findings of fact in *Lewis* v. *Hyland*, 554 F.2d 93 (3d Cir. 1977), *cert. denied*, 434 U.S. 931 (1977), discussed in Appendix B to this brief. The District Court opinion is not reported, but is included in the record filed in this Court in connection with the Petition for Certiorari, *Lewis* v. *Hyland*, No. 77-301, 38a-120a. That opinion described 66 separate highway encounters between motorists and New Jersey State Police and, according to the Court of Appeals, "revealed what can only be described as callous indifference by the

Defendant does not, of course, contend that all police officers will abuse their discretion. As Professor Davis wrote in his classic work on "Police Discretion":

> The reason for limiting and guiding discretion is *not* that human beings cannot exercise unlimited and unguided discretion wisely, justly, and beneficently. They often can. They often do. The reason is that out of a thousand officers, no matter how well screened, a large portion may be expected to abuse their power to a considerable extent, and some—perhaps only a few—are likely to occasional abuse of power that is quite serious.
>
> Davis, Police Discretion 143-44 (1975).

Standardless law enforcement and vague laws pose the same dangers. As Professor Davis has written:

> [W]hat if a statute is clear, and the vagueness is in the enforcement policy? If the police enforce a statute against one out of a hundred known violators, and no one can know in advance which one will be selected or why, does not the system of enforcement encourage arbitrariness and discrimination, and is it not therefore unconstitutional?
>
> Davis, "An Approach to Legal Control of the Police," 52 Texas L. Rev. 703, 704, 714 (1974)

New Jersey State Police for the rights of citizens using New Jersey roads." 554 F.2d at 94. Social science research into the exercise of police discretion similarly demonstrates the dangers of unregulated police discretion. A summary of that research is set forth in Appendix A.

> **2. A rule which invalidates only those arbitrary car stops proven to be improperly motivated would not adequately address the dangers posed by unfettered police authority.**

Courts,[23] commentators,[24] and even the State of Delaware,[25] have acknowledged the danger that unguided police authority to stop cars will result in the harassment of disfavored racial or cultural minorities or be used as a pretext for investigation of unrelated criminal activity, such as possession of drugs, firearms, or stolen vehicles. These assumptions are strongly supported by social science research and literature.[26]

It has occasionally been suggested that, to curb those abuses, the courts need hold invalid only those stops which the criminal defendant can later prove

---

[23] *United States* v. *Montgomery*, 561 F.2d 875, 884 (D.C. Cir. 1977); *Palmore* v. *United States*, 290 A.2d 573, 582-83 (D.C. Cir. 1972), aff'd on jurisdictional grounds only, 411 U.S. 389 (1973); *State* v. *Prouse*, *supra*; *State* v. *Bonds*, 59 Haw. ___, 577 P.2d 781, 785-86 (1978); *Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875 (1973).

[24] Bacigal, "Some Observations and Proposals on the Nature of the Fourth Amendment," 46 G.W.L. Rev. 529, 558-60, 573-9 (1978); Note, "Automobile License Checks and the Fourth Amendment," 60 Va.L.Rev. 666 (1974). See also Case Note, "Fourth Amendment Precludes Drivers' License Inspection Vehicle Stops Not Based on Reasonable Suspicion or Made Pursuant to Random Selection Scheme," 24 Wayne L.Rev. 1123 (1978).

[25] Pet.'s Brief at 15-16.

[26] See Appendix A *infra*.

are motivated by bias or are mere pretexts for criminal investigations. *Palmore* v. *United States*, *supra*, 290 A.2d at 582 (1972); Pet. Brief at 15-16. However, as the Delaware Supreme Court recognized in the decision below, "burdening a criminal defendant with the task of proving that a police officer acted with an illegal subjective intent would, as a practical matter, emasculate any limited rule concerning random stopping procedures and in turn emasculate Fourth Amendment rights," *supra* at 1364 (A28).

This is true for several reasons. First, subjective attitudinal biases will necessarily underlie any police officer's perceptions and selections.[27] A police officer conducting a stop is often unaware that his perceptions or choices are infected by racial, political, or cultural biases, and is unable to articulate the underlying motives for his actions.

Second, in an individual criminal prosecution, the defendant will not be able to produce objective evidence of a pattern or practice of discrimination by introducing a wide-spread sample of police behavior over time.[28] The fact that the individual defendant stopped is black or long-haired, or has a Black Panther bumper sticker on his car,[29] will not be sufficient evidence that his particular stop was prompted by that

[27] See Appendex A, *infra*.

[28] See Appendix B, *infra*.

[29] See Heusenstamm, "Bumper Stickers and the Cops," *Transaction Magazine*, February 1971 (discussed in Appendix A).

sign of "differentness." Recognizing the evidentiary impossibility of establishing individual police bias and hence the ineffectiveness of a legal standard requiring such proof, this Court has repeatedly struck down vague standards which lend themselves too easily to discriminatory application. See, *e.g.*, *Papachristou* v. *Jacksonville*, *supra*.

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), the first case addressing police authority to stop citizens short of formal arrest, this Court explicitly rejected a rule premised on the subjective motivation of the police officer:

> If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate and the people would be "secure in their persons, houses, papers and effects" only in the discretion of the police. *Terry* v. *Ohio*, 392 U.S. at 22.[30]

The Court should not now place upon the individual whose constitutional rights have been violated the nearly impossible burden of proving police bad faith in his individual case when the likelihood of discrimination, resulting from the absence of articulated standards, is so great.

[30] See also *In re Toney C.*, 21 Cal. 3d 888, 893 (1978) ("an investigative stop or detention predicated on mere curiosity, rumor, or hunch is unlawful, even though the officer may be acting in complete good faith.")

II. THE STATE INTEREST IN ARBITRARY TRAFFIC STOPS BY ROVING POLICE PATROLS CONDUCTED AT AN OFFICER'S UNBRIDLED DISCRETION DOES NOT OUTWEIGH THE INDIVIDUAL'S RIGHT TO PERSONAL SECURITY FREE FROM ARBITRARY INTERFERENCE BY LAW OFFICERS.

The reasonableness of a search or seizure depends "on a balance between the public interest, and the individual's right to personal security free from arbitrary interference by law officers." *United States* v. *Brignoni-Ponce*, 422 U.S. at 878.

Except in carefully limited circumstances, warrantless seizures not based on *some* quantum of articulable, individualized suspicion are unreasonable under the Fourth Amendment. See, *e.g.*, *United States* v. *Brignoni-Ponce*, *supra*. Defendant does not and would not contest that Delaware has a legitimate interest in promoting traffic safety. However, Delaware has not demonstrated that arbitrary stops of automobiles by roving police patrols would lead to any gains in traffic safety. Defendant submits that any marginal increase in traffic safety which might be gained by permitting arbitrary car stops by roving officers is not sufficiently weighty to justify departure from the crucial safeguards of the Fourth Amendment. Moreover, arbitrary stops are *not* an effective way of serving the interest in traffic safety, which can be better served by means less offensive to Fourth Amendment values of security, free passage, personal liberty, privacy, and freedom from arbitrary exercise of unbridled of-

ficial discretion.[31] Accordingly, on the record of this case, the Court must conclude that the stop of Defendant without articulable suspicion was unreasonable, as it has consistently held unlawful all such stops. *United States* v. *Brignoni-Ponce*, *supra*; *Carroll* v. *United States*, 267 U.S. 132, 135-154 (1925).

A. The Interest in Traffic Safety is Not Sufficiently Weighty to Justify Arbitrary Traffic Stops Without Individualized Suspicion.

In recent years, the Court has rejected a multitude of claims that particular societal interests justify intrusion into the personal liberty, security, and privacy guaranteed by the Fourth Amendment. Thus, for example, the Court has rejected efforts to dispense with the safeguards of the Fourth Amendment based on "the vital public interest in the prompt investigation of the extremely serious crime of murder," *Mincey* v. *Arizona* , ____ U.S. ____, 57 L.Ed.2d 290 (1978); the public interest in fire investigation, *Michigan* v. *Tucker*, ____ U.S. ____, 56 L.Ed.2d 486 (1978); and the public interest in occupational safety, *Marshall* v. *Barlow's, Inc.*, ____ U.S. ____, 56 L.Ed. 2d 305 (1978).

---

[31] Of course, whenever a question concerning the constitutionality of a warrantless search or seizure arises, the burden *never* rests on the subject of the search or seizure to prove that it was *unreasonable*. Rather, the burden rests on the government to justify it. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454-455 (1971).

In considering dispensing with Fourth Amendment safeguards for seizures of persons riding in automobiles, the Court has held that the overriding national interest in checking the flow of illegal aliens justifies seizures by roving police patrols on less than probable cause, *but only so long as officers are aware of specific articulable facts warranting suspicion* that the vehicle stopped contains illegal aliens. *United States* v. *Brignoni-Ponce*, *supra*. The Court emphasized both "the importance of the governmental interest at stake. . .and the absence of practical alternatives for policing the border." *Brignoni-Ponce*, 422 U.S. at 881. The Court has further held that brief seizures without any showing of suspicion at fixed checkpoints near the border are reasonable, *but only under procedures designed to minimize intrusions upon Fourth Amendment interests*. *United States* v. *Martinez-Fuerte*, *supra*. Justice Powell's opinion for the Court emphasized that "the need for this enforcement technique *is demonstrated by the records in the case* before us," *id.* at 562 (emphasis added). He also carefully distinguished the roving patrols at issue in *Brignoni* from the fixed checkpoint stops *Martinez-Fuerte* presented. *Id.* at 558-60. The Court placed heavy reliance on the fact that the regularized system of established checkpoints at issue in *Martinez-Fuerte* minimized the dangers of "abusive or harassing stops of individuals. . . [as compared to] roving patrol stops." *Id.* at 559. See also *Almeida-Sanchez* v. *United States*, 413 U.S. 266, 270 (1973) (condemning searches conducted at the officer's "unfettered discretion").

To justify the substantial encroachment on Fourth Amendment interests presented by arbitrary stops conducted by roving police patrols, Delaware has advanced only a single interest—the traffic safety interest in enforcing license and registration laws.[32] These laws are premised on the assumption—not demonstrated anywhere on this record—that arbitrary document checks enhance the ability of the public to safely use the roads. More specifically, license and registration laws reflect the assumption that unlicensed drivers are necessarily unsafe drivers, and the unregistered cars are necessarily unsafe cars. Without disputing the importance of the interest advanced by

---

[32] The State of Delaware properly limits its defense of the police practice at issue here to its potential for promoting highway safety. Its *Amicus*, however, argues, perhaps more candidly, that one purpose of the practice is to uncover evidence of crime, particularly stolen cars. (Brief of *Amicus Curiae* in Support of the Petitioner, at nn. 3 and 4). But such arbitrary police behavior in search of evidence of crime can be no more justified under the Fourth Amendment than arbitrary intrusions into the home on the chance that crimes will be occasionally detected, as they no doubt would be, as a result of such practice. See, *e.g.*, *United States* v. *Montgomery*, 561 F.2d 875, 885 (D.C. Cir. 1977); *State* v. *Ochoa*, 23 Ariz. App. 510, 534 P.2d 441, 444 (1975); *Commonwealth* v. *Swanger*, 435 Pa. 107, 114, 307 A.2d 875, 879 (1973). Indeed, even in *Palmore* v. *United States*, 290 A.2d 573 (D.C. Ct. App. 1972), where the court upheld arbitrary stops to check licenses and registrations, the court specifically added that the *Terry* standard of "articulable suspicion"

> does come into play even before the initial stop if there is evidence that the officer's original reason in stopping the vehicle was to investigate some criminal behevior unrelated to the possession of a valid license and a valid registration.
>
> [290 A.2d at 583, n. 24].

the State, it is at once apparent that it is fundamentally different from the interests advanced in *Brignoni-Ponce* and *Martinez-Fuerte*, *supra*. First, the interest in traffic safety is indistinguishable from traditional concerns of domestic criminal law enforcement which do *not* justify relaxation of Fourth Amendment requirements. Enforcement of immigration law, on the other hand, has traditionally offered broader scope to official searches and seizures because of the unique national interests involved. Compare *Mincey* v. *Arizona*, *supra*, and *United States* v. *Ramsey*, 431 U.S. 606 (1977). This Court has many times rejected the claim that increased efficiency in domestic law enforcement suffices to justify departure from the strict requirements of the Fourth Amendment.[33]

Second, in all of its decisions regarding border stops and searches, the Court has relied heavily on "the absence of practical alternatives for policing the border." Compare *Brignoni-Ponce*, 422 U.S. at 881, with *Martinez-Fuerte*, 428 U.S. at 556.[34] The state has

[33] "[T]he mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. Cf. *Coolidge* v. *New Hampshire*, [403 U.S. 443,] 481. . . [T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law." *United States* v. *Chadwick*, 433 U.S. 1, 6-11 (1977). See also *Mincey* v. *Arizona*, *supra*.

[34] "[M]aintenance of a traffic checking program in the interior is necessary because the flow of illegal aliens cannot be controlled effectively at the border. . . [R]outine stops at permanent check-

made no similar showing here, nor could it. Delaware has failed to demonstrate that arbitrary stops by roving police patrols are the most effective way of serving its interest, or that they are effective at all.[35] It has produced no empirical evidence to show how often arbitrary stops by roving patrols result in the discovery of unlicensed drivers or unregistered cars, or, more importantly, in the prevention of accidents. The State's argument rests on nothing more than a hunch that arbitrary stops are helpful in promoting traffic safety.[36] It has produced *no* evidence to show that such stops are *necessary*.

points [is] a practice which the government identified as the *most important* of the traffic-checking operations." *Martinez-Fuerte*, 428 U.S. at 556.

[35] See *infra* at ____.

[36] That "hunch," insofar as it assigns authority to the individual patrolman to set enforcement standards, runs directly contrary to the recent findings of the National Advisory Commission on Criminal Justice Standards and Goals. National Advisory Commission on Criminal Justice Standards and Codes: Police, Standard 9.6 Traffic Operations, p. 225. The Commission specifically cautions against those undefined traffic enforcement procedures which allow individual police officers to create enforcement standards. The Commission has found that such enforcement procedures are both inefficient and, indeed, counterproductive to the goal of fostering voluntary compliance with traffic safety laws. *Id.* at 227. The Commission concludes with the recommendation that:

> every police agency should develop and implement written policies governing the investigation of traffic accidents, the enforcement of state and local traffic laws, and traffic direction. Police chief executives should ensure that these policies are regularly communicated to all supervisors aand line personnel. [*Id.* at 225].

Finally, the magnitude of the problem addressed in *Brignoni-Ponce* and *Martinez-Fuerte* is not matched by the speculative incremental increase in traffic safety that license and registration checks might occasion.[37] Based on these differences, Defendant submits that the speculative increase in traffic safety advanced here is not of sufficient interest to justify dispensing with the requirement that seizures of persons are constitutionally permissible only upon specific articulable facts that reasonably warrant suspicion that the vehicles are operated by persons violating state licensing, registration, or other motor vehicle laws. Compare *United States* v. *Brignoni-Ponce*, 422 U.S. at 884.

On the basis of its prior holdings, the Court can only uphold this seizure if it finds that arbitrary stops by roving police patrols are a necessary and effective means of advancing traffic safety, and that no less intrusive techniques would advance that interest equally well. On the record presented here, no such findings are possible.

[37] The Court noted in *Martinez-Fuerte* that more than one-quarter of all deportable aliens apprehended in 1975—55,000 of 175,511— were apprehended through traffic checking seizures mostly at fixed checkpoints. *Martinez-Fuerte*, 428 U.S. at 553. Petitioner here had made no similar showing that arbitrary stops by roving police patrols appreciably aid either enforcement of licensing and registration laws, or furtherance of the State's asserted interest in promoting traffic safety.

1. Documentary registration inspections are not an effective or necessary means of identifying unsafe vehicles.

Contrary to the State's submission, mere possession of apparently proper documents is not inherently related to highway safety. *State* v. *Ochoa*, 23 Ariz.App. 510, 534 P.2d 441, 443 (1975), *rev'd on other grounds*, 112 Ariz. 582, 544 P.2d 1097 (1976); *People* v. *Superior Court, County of Los Angeles*, 436 P.2d 1025 (Cal. 1976). Moreover, even granting the connection between registration and safety, a stop of a motor vehicle is unnecessary to establish that an automobile has been inspected and registered. Delaware has mandatory annual vehicle inspection, 21 Del. C. § 2143(a), which is a prerequisite for registration. Every properly registered Delaware vehicle has a color coded, easily visible sticker affixed to the rear license plate which, at a glance, informs every passing police officer whether the vehicle has been properly registered and properly certified by the state as safe, 21 Del. C. § 2121(d). The registration card which is also provided the operator at the time of registration would, of course, not be visible to a police officer without stopping the driver. But the registration card provides only limited additional information—the name and address and signature of the owner, together with a description of the vehicle, 21 Del. C. § 2107(d). Such information, while useful in investigating such crimes as auto theft, is *not* necessary for the simple task of determining if a vehicle is registered and consequently

inspected, 21 Del. C. § 2142-43, and therefore safe. A document check stop, limited as the State asserts it is, would *not* ascertain newly developed facts bearing on traffic safety.

Thus, although the State's parade of horribles includes the spectre of a darting child being struck down by a vehicle with failing brakes because the police were prohibited from making spot checks of vehicle equipment (Pet.'s Brief, p. 8), the limited seizure it is seeking to justify here does *not* include such equipment inspection. The purpose of the spot check, we are told, is *solely*, to inspect the documents, driver's license and registration, and "if these two documents are in order, the motorist is allowed to proceed." (Pet.'s Brief, p. 12; see also *id.* at 14-15). Delaware law does authorize police, for reasonable cause shown, to stop a motor vehicle and to require that the vehicle submit to an additional inspection, 21 Del. C. § 2144. But that statutory authority argues strongly *against* the State's claim that unauthorized stops are necessary to meet the interest in safety. To the contrary, the Delaware legislature has obviously focussed on that interest, and provided a means to advance it consistent with the liberties of Delaware drivers. The legislature's failure to authorize the intrusive stops defended here, and provision of an alternative means for serving the interest in traffic safety and documentation checks, militates against the claim that such stops are "necessary." Serious intrusions into constitutional interests ought to be made by higher author-

ity than individual patrolmen acting without statutory guidance. Cf. *Hampton* v. *Mow Sun Wong*, 426 U.S. 88 (1976).

In short, arbitrary car stops by roving patrols to check registration documents would do little, if anything, to keep unregistered, and arguably unsafe, cars off the road.

2. Documentary license inspections are not an effective or necessary means of identifying unsafe drivers.

There is no evidence in the record that unlicensed drivers are a widespread phenomenon, of anything like the magnitude of the illegal alien problem in the Southwest that led to the Court's sanctioning fixed-point seizures in *Martinez-Fuerte*.[38] Nor is there any indication in this record that arbitrary stops of motorists by roving patrols are an effective way of uncovering unsafe drivers, an evidentiary lacuna in sharp contrast with the Court's findings in *Brignoni-Ponce* and *Martinez-Fuerte*, based on extensive statistical evidence, that traffic checking was effective in uncovering illegal aliens. Moreover, even where the Court found that there *was* some rational connection between an identifiable individual characteristic and a valid state interest, it held that that characteristic, standing alone, was insufficient to justify an arbitrary roving patrol stop. *Brignoni-Ponce*, 422 U.S. at 886.

---

[38] See, *e.g.*, *United States* v. *Martinez-Fuerte*, 428 U.S. at 551-52.

The State here has not pointed at *any* articulable facts to justify stopping Defendant, or some drivers rather than others: it seeks a wholly unfettered discretion to stop automobiles. But there is not, and cannot sensibly be, evidence that persons whom a particular policeman arbitrarily chooses to stop are less likely to be properly licensed, or safe, than those persons whom the policeman capriciously chooses *not* to stop. To the contrary, the opposite is more likely true. No particular individual characteristic, outside of extreme youth or bad driving habits, is likely to identify the unlicensed driver. The way to identify bad driving is to look for it.[39]

[39] For example, a "Selective Traffic Enforcement Program" in Flint, Michigan, dramatically reduced the number of deaths caused by traffic accidents by increasing enforcement emphasis on hazardous moving violations such as speeding, running traffic signals and driving while under the influence of alcohol. Reported in National Advisory Commission Report on Criminal Justice Standards and Codes: Police 230 (1973).

This "common sense" assumption is further borne out by other studies which have explored methods of improving traffic safety. The United States National Highway Traffic Safety Administration created a Participant's Reference manual designed for use in highway safety workshops for Traffic Court Judges (Wash., 1973, 90 p.). The manual excerpts and discusses the safety recommendations made by the authors of numerous articles and books, placing emphasis on eliminating road hazards, developing better highway directive and warning signals, producing safer cars, increasing driver safety training, and vigorously enforcing speeding and drunken driving laws. The workshop manual does not mention arbitrary document checks of passing vehicles as a means of increasing highway safety. Indeed, a routine vehicle stop is consistently described as a stop for a known violation of traffic law.

3. This Court has already identified less intrusive alternatives to arbitrary stops by roving patrols which would adequately protect the relevant societal interest.

The Court condemned arbitrary stops by roving patrols in *Brignoni-Ponce*, even where the government made a strong showing of necessity, and where it further showed that the arbitrary nature of the stop was somewhat reduced by reliance on the location of the stop and the nexus between the Mexican appearance of the passengers and the ancestry of the bulk of illegal aliens. The State here stands on even weaker ground, for recognition of the power it seeks would sanction not only stops near the border, but stops (functionally identical in time, scope, and circumstance to those condemned in *Brignon-Ponce*) *anywhere in the country*. The dangers foreseen by the Court in *Brignoni-Ponce* would be dwarfed by the stop authority sought here.[39]

[39] "We are are unwilling to let the Border Patrol dispense entirely with the requirement that officers must have a reasonable suspicion to justify roving-patrol stops. In the context of border area stops, the reasonableness requirement of the Fourth Amendment demands something more than the broad and unlimited discretion sought by the Government. Roads near the border carry not only aliens seeking to enter the country illegally, but a large volume of legitimate traffic as well. San Diego, with a metropolitan population of 1.4 million is located on the border. Texas has two fairly large metropolitan areas directly on the border: El Paso, with a population of 360,000, and the Brownsville-McAllen area, with a combined population of 320,000. We are confident that substantially all of the traffic in these cities

The existence of numerous, more effective, and less intrusive alternatives to arbitrary traffic stops by roving patrols also demonstrates that the stops here are constitutionally offensive. First, patrolmen can, and do, simply observe traffic flow, and, in the exercise of informed professional discretion, pick out vehicles based on "specific, articulable facts, together with rational inferences from those facts, that vehicles" are driving in an unsafe or illegal manner. Compare *Brignoni-Ponce*, 422 U.S. at 884. Stopping those drivers who appear dangerous will thus serve the dual purpose of (1) pulling unsafe or uncertified drivers off the road; and (2) improving the odds that license and registration laws will be enforced (assuming that unsafe drivers are, in fact, likely to be unlicensed).

---

is lawful and relatively few of their residents have any connection with the illegal entry and transportation of aliens. To approve roving-patrol stops of all vechicles in the border area, without any suspicion that a particular vehicle is carrying illegal immigrants, would subject the residents of these and other areas to potentially unlimited interference with their use of the highways, solely at the discretion of Border Patrol officers. The only formal limitation on that discretion appears to be the administrative regulation defining the term 'reasonable distance' in § 287(a) (3) to mean within 100 air miles from the border. 8 CFR § 287.1(a) (1975). Thus, if we approved the Government's position in this case, Border Patrol officers could stop motorists at random for questioning, day or night, anywhere within 100 air miles of the 2,000-mile border, on a city street, a busy highway, or a desert road, without any reason to suspect that they have violated any law.

We are not convinced that the legitimate needs of law enforcement require this degree of interference with lawful traffic. . ." 422 U.S. at 882-3.

Second, if there really is some strong state interest in a truly random system of documentary inspection of motorists, it could be implemented by either fixed checkpoints or other systematic, non-discretionary inspection procedures (such as electronically identifying every 100th, or 1000th, vehicle to pass a particular point, such as a toll booth). Although the Defendant does not concede that even those procedures would pass scrutiny under the Fourth Amendment, the Court has held that the difference between roving patrols and fixed checkpoint stops is of constitutional significance. Distinguishing between the arbitrary stops condemned in *Brignoni-Ponce* and the fixed stops sanctioned for border control interests in *Martinez-Fuerte*, the Court observed:

> [R]andom roving-patrol stops could not be tolerated because they "would subject the residents. . .to potentially unlimited interference with their use of the highways. . . There was also a grave danger that such unreviewable discretion would be abused by some officers in the field.

Routine checkpoint stops do not intrude similarly on the motoring public. First, the potential interference with legitimate traffic is minimal. Motorists using these highways are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere. Second, checkpoint operations both appear to and actually involve less discretionary enforcement activity. The regularized manner in which established checkpoints are operated is visible evidence, reassuring the law-

abiding motorists, that the stops are duly authorized and believed to serve the public interest. The location of a fixed checkpoint is not chosen by officers in the field, but by officials responsible for making over-all decisions as to the most effective allocation of limited enforcement resources. We may assume that such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. And since field officers may stop only those cars passing the checkpoint, there is less room for abusive or harassing stops of individuals than there was in the case of roving-patrol stops. . . 422 U.S. 559.

As Defendant has demonstrated,[40] the room for unbridled exercise of discretion, and the potential for harassment and abuse presented by the roving-patrol stops defended here by the State, is at least as great. The Court has identified this discretion as a central evil at which the Fourth Amendment is directed. Even where searches and seizures are justified on less than probable cause to believe a crime has been committed, the Court has required alternative standards that preserve the public interest without wholly forfeiting individual interests in security, privacy, and liberty. See, *e.g.*, *Marshall* v. *Barlow's, Inc.*, U.S. , 56 L.Ed.2d 305 (1978) (warrant issued pursuant to administrative plan containing specific neutral criteria avoids dangers of unbridled discretion); *Terry* v. *Ohio*, 392 U.S. 1 (1968) (stop and frisk permitted on basis

[40] *Supra* at p. 19 n. 22. *See also* Appendix B, *infra*.

of specific and articulable facts warranting fear for safety); *United States* v. *Brignoni-Ponce*, 422 U.S. at 884 (stop by roving patrol on basis of specific articulable facts warranting suspicion that vehicle contains illegal aliens).[41]

The dangers posed by unchecked roving patrols, with the power arbitrarily to stop and question occupants of automobiles anywhere, for no reason at all, without even the guidance of statutory or administrative regulation, far outweighs their marginal utility. Although the Court has noted in *dictum* that "the practice of stopping automobiles briefly for questioning has a long history evidencing its utility and is accepted by motorists as incident to highway use," *Martinez-Fuerte*, 422 U.S. at 560 n. 14, Defendant respectfully submits that the roving, arbitrary stop, based on anything less than specific articulable facts warranting belief that the operator is driving unsafely or illegally is neither useful[42] nor long accepted.[43] In-

[41] See also *United States* v. *Doran*, 482 F.2d 929 (9th Cir. 1973), and *United States* v. *Lopez*, 328 F.Supp. 1077 (E.D.N.Y. 1971) (anti-hijacking searches conducted on the basis of articulable facts). *See generally*, Ingram, "Are Airport Searches Still Reasonable?" 44 Jl. of Air Law & Commerce, 131 (1978). Where less immediate threats to innocent lives are involved, the courts have repeatedly struck down similar procedures. See, *e.g.*, *United States* v. *Craemer*, 555 F.2d 594 (6th Cir. 1977) (invalidating searches based on Drug Enforcement Administration's "drug courier profile").

[42] See *supra* at pp. 29-33.

[43] "[N]o one acquires a vested or protected right in violation of the constitution by long use, even when that span of time covers our entire existence and indeed predates it." *Walz* v. *Tax Com-*

deed, the Court' decision in *Brignoni-Ponce* makes sense *only* as a holding, dispositive here, that stops for questioning by roving patrols, based on no articulable and specific facts, are unreasonable under the Fourth Amendment.

The license to interfere with free movement of law-abiding citizens throughout the nation requested here has been steadfastly rejected by the Court at least since 1925. Even under the pressure of the law enforcement problem created by Prohibition, the court unanimously condemned arbitrary stops of automobiles without cause:

> It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search. . . [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search. . .
>
> *Carroll* v. *United States*, 267 U.S. 132, 153-54 (1925) (Taft, C.J.).

mission, 397 U.S. 664, 678 (1970). Indeed the Court has specifically rejected just such an argument in the context of Fourth Amendment car searches when it struck down the Border Patrol's long-standing practice of arbitrarily stopping and searching cars for illegal aliens—even though the practice had also been sanctioned by Congressional statute, administrative regulation, and court decisions for a period in excess of 24 years. See *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973).

4. The interest in promoting respect for legal authority counsels against arbitrary police power.

In *Terry* v. *Ohio*, this Court acknowledged that "the degree of community resentment aroused by particular [police] practices is clearly relevant to an assessment of the quality of the intrusion upon reasonable expectations of personal security caused by those practices." 392 U.S. 1, 17 n. 14. The *Terry* opinion cited the findings of a presidential commission that "in many communities, field interrogations are a major source of friction between the police and minority groups" and that this friction increases "as more police departments adopt aggressive patrols in which officers are encouraged routinely to stop and question persons on the street who are unknown to them." *Id.* at 14, n. 11, citing President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Police 183 (1967).

Six years later, an LEAA -funded Task Force on Criminal Justice Standards and Goals noted the corrosive effect,[44] even the appearance of arbitrariness has upon "public trust in the police," which was listed as one of the ultimate goals toward which criminal justice standards should be directed. National Advi-

[44] See also *Long* v. *District of Columbia*, 969 F.2d 927, 939 (D.C. Cir. 1972) (Wright, J., concurring): "The security of our citizens from official lawlessness, with its corrosive effect on private citizens' self-discipline and respect for government, demands no less."

sory Commission on Criminal Justice Standards and Goals: Police 9 (1973). As the Commission stated: "The acceptance of police authority depends largely on the belief that its exercise is reasonable." *Id.* at 18.

These observations by the Court and commissioners were confirmed by a recent study carried out by the Center for Police Development at Southern Methodist University School of Law. After reporting that the observed police officers focused their field interrogation practices disproportionately on young black males, the director of the Center commented:

> The persons subjected to the intrusion often perceive that they are a group singled out for special treatment. Accordingly, they react to this treatment with a sense of frustration, feeling that the system of just and fair administration of government power is substantially suspect.[45]
>
> Bogomolny, "Street Patrol: The Decision to Stop a Citizen," 12 Crim.L.Bull. 544, 573 (1976).

It is, as this Court confirmed in *Terry*, one of the fundamental goals of our Constitution to protect and enhance the citizen's faith in the fairness of government. Whatever limited utility arbitrary stops may

[45] The public perception that police arbitrarily single out for attention certain population groups is by no means limited to members of racial minority groups. Columnist Russell Baker commented in his New York Times column of September 14, 1977, that "[m]iddle class whites caution their sons against driving the New Jersey Turnpike with long hair." See discussion of *Lewis* v. *Hyland*, at App. B., *infra*.

have in advancing traffic safety is vastly outweighed by their corrosive impact on public trust in government and hence public compliance with law in general.[46]

Nothing short of individualized and articulable suspicion, or a structured and publicized program of inspections designed to remove the potential for individual police arbitrariness, can ensure both the government's interest in traffic safety and public acceptance of government authority generally.

III. THERE IS A POSSIBILITY THAT THE JUDGMENT OF THE COURT BELOW RESTED ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

Although Defendant believes that the judgment below should be affirmed on its merits, candor compels him to admit substantial doubt whether jurisdiction presently lies in this Court. A careful reading of the Delaware Supreme Court's opinion strongly sug-

[46] It is, in part, because the appearance of arbitrariness itself undermines faith in the administration of justice that the state's proposed standard of only barring proven discriminatory stops is unacceptable. (Pet. Brief at 15). For, long as the public perceives that police authority to stop is unbounded by standards or articulable suspicions, the exercise of that authority will *appear* arbitrary, especially to those who are powerless or the victims of discrimination. A rule that only bars those stops which can later be proven to be improperly motivated cannot satisfy that concern.

gests that its judgment rested upon an independent, adequate state ground. The Court below held:

> Because we are of the opinion that non-systematic stops by police, who have no reasonable suspicion that a legal violation has occurred, violate Federal and State constitutional guarantees, we affirm the Superior Court order and dismiss this appeal. (A21)

The Court said further:

> The Delaware Constitution, Article I, § 6, is substantially similar to the Fourth Amendment and a violation of the latter is necessarily a violation of the former. *State* v. *Moore*, Del. Super. 187 A.2d 807 (1963).

The Delaware Court thus held that a violation of the Fourth Amendment is necessarily a violation of the state constitution. But it left unclear whether the arbitrary stop before it would have violated the Delaware Constitution, even if it did not violate the Fourth Amendment.

In short, it is unclear, and quite possible, that the evidence at issue was independently subject to suppression under Delaware law. See *Schaffer* v. *State*, 184 A.2d 689 (Del. Sup. Ct. 1962).

Where an adequate and independent state ground clearly exists for a decision, this Court does not review the federal question in order to preserve the proper division of authority between state and federal courts.

Murdock v. *City of Memphis*, 20 Wall. 590 (1875). Where a state court opinion leaves ambiguous whether its decision was grounded on state or federal law, this Court has either dismissed the writ of certiorari as improvidently granted, *Jankovich* v. *Indiana Toll Road Commission*, 379 U.S. 487 (1955), or has sought clarification from the state court prior to ruling on the federal issue. See, *e.g.*, *Ohio* v. *Gallagher*, 425 U.S. 257 (1976); *California* v. *Krivda*, 409 U.S. 33 (1972); *Mental Hygiene Dept.* v. *Kirchner*, 380 U.S. 194 (1965). Such clarification is necessary to avoid the anomaly presented when a subsequent state court judgment renders this Court's opinion advisory. See *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), judgment reinstated under state constitution, ____ S.D. ____, 247 N.W. 2d 673 (S.D. 1976).

Because the basis for the opinion below is unclear, the Court should dismiss the writ of certiorari as improvidently granted. In the alternative, the Court should vacate and remand for clarification, or continue the case pending application by petitioner to the state court for clarification of the basis of its judgment. *Herb* v. *Pitcairn*, 324 U.S. 117, 128 (1945).

CONCLUSION

Even when, as in *United States* v. *Carroll*, *supra*, the enforcement of an express command of a constitutional amendment was the public interest asserted to justify intrusions into personal liberty similar to

these, this Court declined to provide unsupervised, unregulated law enforcement officials with the unlimited power to stop automobiles on the highway on the basis of their own unfettered discretion.

The state interest *asserted* here is the general one of promoting traffic safety. But the record in this case is devoid of any evidence suggesting that arbitrary vehicle stops by roving police patrols will further that end. In reality, the only state interest at issue in this case is the enforcement of certain licensing and registration laws.

When the only interest at stake is investigation of such petty offenses, when the technique at issue is bounded by no specific neutral criteria, when the effectiveness of that technique is wholly undemonstrated, and when far more effective techniques are available to further the interest asserted—then the power of uncontrolled search and seizure, "one of the first and most effective weapons in the arsenal of every arbitrary government," *Brinegar* v. *United States*, 338 U.S. 160, 180 (1949) (Jackson, J., dissenting), must be denied.

For the reasons stated in Arguments I and II, the judgment of the Delaware Supreme Court should be affirmed. In the alternative, for the reasons stated in Argument III, the writ of certiorari should be dismissed as improvidently granted, or the case remanded for clarification by the Delaware Supreme Court as

to whether its judgment rests on adequate and independent state grounds.

Respectfully submitted,

FRANK ASKIN
ERIC NEISSER
Constitutional Litigation Clinic
Rutgers Law School
15 Washington Street
Newark, NJ 07102

CHARLES S. SIMS
c/o American Civil Liberties Union Foundation
22 East 40th Street
New York, NY 10016

DAVID M. LUKOFF
RICHARD E. FAIRBANKS, JR.
RICHARD M. BAUMEISTER
Assistant Public Defenders

LAWRENCE M. SULLIVAN
Defender
Public Defender of the State of Delaware
820 French Street
Wilmington, Delaware 19801

Attorneys for Respondent

APPENDIX

APPENDIX A

Police Discretion: The Social Science Perspective

The danger inherent in unregulated police authority is extensively documented by social science research. Although the State has characterized Patrolman Avena's stop as a "random" stop, human beings are simply incapable of producing random results unless they follow scientific randomization *methods*, such as using a random-number generator. Individuals, including police officers, are inevitably influenced by their past experiences, values, and attitudes where they are called upon to select other human beings or to gauge their motives or intent. "[T]he general inclination to place a person in categories according to some easily and quickly identifiable characteristic such as age, sex, ethnic membership, nationality, or occupation, and then to attribute to him the qualities believed to be typical of members of that group," results in judgments not about the observed act but about the actor based upon a previously adopted stereotype.[1] "[A]n individual's perception of a stimulus, object or event is influenced by his particular needs, wishes, and expectations of the moment—[that is,] we tend to perceive what we wish or expect to perceive."[2]

---

[1] Tajfel, "Social and Cultural Factors in Perception," in *Handbook of Social Psychology*, 423 (Lindzey and Aronson eds., 1969).

[2] Duncan, "Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks," 34 *Journal of Personality and Social Psychology*, 590 (1976).

For example, one basic mode of human communication is facial expression. Such messages were once thought to be universally recognizable, but recent experimentation has determined that ". . . [W]e do not interpret 'messages' sent by black faces (whether young, old, male or female) the same as 'messages' sent by white faces. Similarly, we do not interpret 'messages' sent by male faces (whether black, white, young or old) the same as 'messages' sent by female faces."[3] Furthermore, human beings make very harsh or very generous judgments about the behavior of others based exclusively on their appearance. In one experiment, two groups of college students were given identical descriptions of a small boy roaming about a playground and committing acts of minor destruction. One group had a photograph of an attractive child appended to the story and the other group a photo of a distinctly unattractive child. The attractive child was more frequently seen as engaged in boyish mischief while the unattractive child was more frequently labeled as malicious and destructive.[4]

[3] Eiland and Richardson, "The Influence of Race, Sex and Age on Judgments of Emotion Portrayed in Photographs," 45 *Communication Monographs*, 167, 174-5 (1976).

[4] Dion, "Physical Attractiveness and Evaluations of Children's Transgressions," 24 *Journal of Personality and Social Psychology*, 207 (1972).

By nature and training, human beings attribute blame even to those who are adversely affected by events over which they have no control, and again physical appearance strongly influences judgment. In an experiement, a young woman was described as having chosen to take a position with a firm that

In another experiment, under rigorously controlled conditions, white college students were shown black and white actors engaging in identical behavior. The only variable differentiating the control group from the experimental group was race. During the course of a conversation, one of the actors, by prearrangement with the experimenter, was seen shoving another actor. Observers were led to believe that this be-

subsequently lost a government contract, causing her to lose her position. Was this the "fault" of the young woman? Those asked to judge were much more likely to agree that she was at fault if a photo of an unattractive female was appended to the story; those receiving a photo of an attractive female were less likely to attribute fault to the subject of the story. The reverse relationship also holds true. "[A]ttractive persons are considered to be more responsible for favorable events than unattractive persons. . . Unattractive people may in some way constitute a group discriminated against." Seligman, Paschall, and Takata, "Attribution of Responsibility for a Chance Event as a Function of Physical Attractiveness of Target Person, Outcome, and Likelihood of Event," Proceedings, 81st Annual Convention, APA, 1973, p. 147-8.

People may also be strongly influenced in their response by the perceived social status of those with whom they interact. People will generally associate more positive characteristics with persons of high social status and negative (or at least less positive) characteristics with those perceived to be of lower social status. Experimental evidence, in one study, for example, indicates that a well-dressed person is more likely to have her/his property returned than a poorly dressed person. Experimenters left dimes in phone booths in Grand Central Station, New York. After these booths were again occupied, the experimenters approached the booths and requested that the 'forgotten' coin be returned. The well-dressed experimenters had their dimes returned much more frequently than those who were poorly dressed. Bickman, "The Effect of Social Status on the Honesty of Others," 85 *Journal of Social Pshychology*, 87 (1971).

haviour was spontaneous and were asked to judge the reason for it. Was the actor who delivered the shove playing around, dramatizing his point, or exhibiting aggressive or violent behavior? Only 17 percent of the white observers who saw a white person shove a black person attributed violent or aggressive intent to the actor, while 75 percent of the observers who saw a black person shove a white person interpreted this behavior as aggressive or violent. According to the researcher: "If this finding is so readily available for college subjects, its generalizability to other subject populations can be expected to be even more dramatic."[5]

Because of this labeling process, it is more likely that negative conclusions will be drawn about the essentially neutral acts of those upon whom negative stereotypes are imposed. It is also more likely that more of these neutral acts will be noticed, because those who are disliked or "different" will especially attract the observer's attention.[6]

[5] Duncan, " Differential Social Perception and Attribution of Intergroup Violence: Testing the Lower Limits of Stereotyping of Blacks," 34 *Journal of Personality and Social Psychology*, 590, 597 (1976).

[6] Miller and Bieri, "Cognitive Complexity as a Function of the Significance of the Stimulus Objects Being Judged," 16 *Psychological Reports*, 1203 (1965). So powerful and pervasive is the stereotyping or labeling process that even protracted and intense professional training may not eradicate its effects. Thus, experiments have shown that highly trained clinicians' diagnoses are biased by pre-judgment labeling of patients according to their alleged status. "Labels may create a judgmental set to focus upon the label itself rather than upon the network of traits and behaviors implied by a particular description of personality." Paquin and Jackson, "Labeling Effects in Clinic Judgments of Psychopathology," 33 *Journal of Clinical Psychology* 109 (1977). See also Routh and King, "Social Class Bias in Clinial Judgment," 38 *Journal of Consulting and Clinical Psychology* 202 (1972).

While stereotyping is common to the general population, the fact that police may employ force and apply sanctions magnifies the importance of their expression of such bias. A team of scholars from the University of Albany School of Criminal Justice recently did an extensive study of police attitudes which affect patrol practices in a joint project with the Oakland, California Police Department. They found that alienation, a feeling of disassociation from and hostility toward a larger group, is especially prevalent among police officers. This alienation, and the stereotyping which inevitably accompanies it, may cause an officer to have "little respect for a large number of citizens (whom he may characterize as intrinsically evil and incorrigible)."[7]

In a study conducted on the process of impression formation which a police officer undergoes while on patrol, both junior and senior officers were found to focus on the demeanor and attitudes of citizens in interpreting citizen behavior. That is, the officers tend to rely more heavily on person-related characteristics

[7] Toch, Grant and Calvin, *Agents of Change: A Study in Police Reform*, 8 (1975).

than on situation-related characteristics.[8] In another study undertaken by the American Bar Association, it was found that

> [I]n the absence of adequate guidance from his supervisors, the tendency of an individual police officer is to attempt to meet the varied demands made upon him through a very personal form of improvisation. Confronted each day by frequently recurring situations, the officer tends to develop his own informal criteria for disposing of matters coming to his attention—depending heavily upon his imagination and resourcefulness. And he employs, as well, the informal criteria which have, over the years, developed within the agency of which he is a part.[9]

Police selection and training processes tend to reinforce stereotypes, according to a recent book by Professor Alan Edward Bent, Associate Director of the Institute of Governmental Studies and Research at Memphis State University and a consultant to the Memphis Police Academy and Memphis Police Department Training Division. According to Professor Bent, the first step is the officer selection process, which tends to seek out applicants who attitudes and opinions are compatible with the existing member-

---

[8] Rozelle and Baxter, "Impression Formation and Danger Recognition in Experienced Police Officers", 96 *Journal of Social Psychology*, 53 (1975).

[9] *Standards Relating to the Urban Police Force*, American Bar Association Project on Standards for Criminal Justice, 122-125 (1972).

ship. These personal values are revealed in the oral interview and questionnaire stage, and tend to produce homogeneity within each department. Additionally, the characteristics of applicants seeking police careers tend to perpetuate homogeneity. Police departments have historically been composed mostly of white males with a shared perspective on law and order, as well as other common social mores.[10] Once the recruit passes from training to an assignment in the department itself, police veterans are likely to impart their biased definition of criminality and to train the rookie to pick out suspicious behavior according to often erroneous peer group perceptions. As explained by another student of police socialization:

> While most instructors attempt to be objective, their biases are usually clear, either by virtue of their asides while instructing, their racial jokes, or their obvious contempt toward recent court rulings.[11]

The homogeneity of police attitudes is further demonstrated by an elaborate study of the value patterns of a midwestern police force and a comparison of those attitudes with those held by the public as a whole. The study found "a somewhat larger value gap on the whole between police and blacks than between police

---

[10] Bent, *The Politics of Law Enforcement*, 16-17 (1974).

[11] Castberg, "The Exercise of Discretion in the Administration of Justice" (paper prepared for delivery at 1972 Annual Meeting of the American Political Science Association, Washington, D.C., December 5-9, 1972) (quoted in Bent, *op cit.* at 20).

and whites matched on age and education, *but the value gap is considerable in both cases.*" (emphasis added). The authors further noted that the value gap "involves not only discrepancy in *value patterns* but also a discrepancy that implies *value conflict* between police and policed."[12] (emphasis added).

While police street behavior is of extremely low visibility and thus difficult to document, the social researchers who have attempted to examine it have found that, in ambiguous situations, police tend to make decisions based on subjective factors reflecting their personal biases. Yale sociologist Albert J. Reiss, Jr. reports that "lower-class males are disproportionally the targets of police misconduct. . .[13] William Westley, in a study of police in a midwestern city near Chicago, stated that "[f]or the police the Negro epitomizes the slum dweller and, in addition, he is culturally and biologically inherently criminal."[14] Other studies have all reached the same conclusion: that white police officers tend to evidence generally negative feelings toward blacks and, as a result, tend to treat black offenders more harshly.[15]

---

[12] Rokeach, Miller and Snyder, "The Value Gap Between Police and Policed," 27 *Journal of Social Issues* 155, 166-7 (1971).

[13] Reiss, *The Public and the Police* 151 (1971).

[14] Quoted in Thomas and Fitch, "Discretionary Decision-Making," 54 *N. Dak. L.Rev.* 61, 73 (1977).

[15] Kephart, *Racial Factors and Urban Law Enforcement* 75-107 (1957) (study of the Philadelphia Police Department); Ferdinand and Luchterhand, "Inner-City Youth, the Police, the Juvenile Court, and Justice," 17 *Soc. Prob.* 510 (1970).

The conclusion reached by all of the relevant literature, in short, is that police officers' behavior will reflect their biases when the officers are given free rein. This conclusion is dramatically reinforced by the results of a 1969 study performed at California State College in Los Angeles. The experiment was conducted by 15 students representing a cross-section of the population. None of the students had received a ticket for a moving violation in the preceding 12 months and all of them had cars in satisfactory condition. Each affixed a "Black Panther" bumper sticker to his/her car and went about his/her normal commuting pattern. With 17 days they have been issued 33 traffic citations and had depleted the $500 fund which had been established to pay traffic fines. Although there were admitted methodological weaknesses in this study, the researcher noted that "it is statistically unlikely that this number of previously 'safe' drivers could amass such a collection of tickets without assuming real bias by police against drivers with Black Panther bumper stickers."[16]

A study done in 1973 at the Center for Police Development of the Southern Methodist University School of Law produced similar results. This study reviewed the incident of stops of both pedestrians and cars that did not result in either a traffic citation or arrest for a specific crime as compared with persons

---

[16] Heusenstamm, "Bumper Stickers and the Cops," *Transaction Magazine*, February 1971.

actually arrested for such offenses in that jurisdiction during the preceding year as well as a control sample obtained through the use of a roadblock. It found that the group of people stopped without cause contained a significantly ($p < .01$)[17] greater number of young black men than would be expected based on the control group (the roadblock sample). The author of this study concludes that all police organizations should carefully review street contact with citizens because, "[r]eview of police street performance could lead to a finding that decisions to arrest or stop persons are founded on prejudicial beliefs of the officers which are translated into genuine [but] ill-founded suspicions that such persons are dangerous."[18]

---

[17] The possibility of this happening by chance is 1/100.

[18] Bogomolny, "Street Patrol: The Decision to Stop a Citizen," 12 *Crim. Law Bull.* 544, 573 (1976).

APPENDIX B

The Record in the Case of *Lewis* v. *Hyland* Illustrates the Danger of Unregulated Police Discretion in Highway Patrol.

The lengthy record in the case of *Lewis* v. *Hyland*, 554 F.2d 93 (3d Cir. 1977), *cert. denied*, 434 U.S. 931 (1977), offers a glimpse of the far-reaching consequences of the type of police behavior involved in this case and illustrates vividly the findings of social scientists. The *Lewis* case, which was brought in the United States District Court in Newark, New Jersey, charged that the New Jersey State Police were engaged in a pattern or practice of harassing drivers of a particular appearance ("long-haired travelers") by stopping and searching their persons and vehicles without probable cause.[1]

---

[1] As set forth by Judge Shaw in the initial opinion in that case:

> It is alleged in the complaint that this is a class action by plaintiffs consisting
>
> . . .of persons of highly individualized personal appearance who travel in private vehicles upon the public toll roads and public highways of the State of New Jersey and who are subject, solely because of said highly individualized personal appearance, to the pattern and practice of selective halting and unreasonable searching of vehicles and travelers.
>
> . . .The said sub-class of persons of highly individualized personal appearance includes, but is not limited to, persons wearing beards, unusual hairstyles, or unorthodox clothing or who in some other way are visually distinguishable from the average user of the said road (said sub-class hereinafter referred to as "longhaired travelers").
>
> Observation of the witnesses who testified and others seated in the courtroom ready to testify as plaintiffs left no

The Third Circuit reviewed the District Court's catalog of 66 separate highway incidents involving state troopers and citizens and observed that the "extensive findings of fact reveal what can only be described as callous indifference by the New Jersey State Police for the rights of citizens using New Jersey roads." 554 F.2d at 94. Of the incidents described, 34 involved "clear violations of Fourth and Fourteenth Amendment rights." *Id.* at 96-7. Most victims of police misconduct are satisfied to continue on their way without further inconvenience, and will not "make waves." The district court realized that plaintiffs' proofs were only the tip of the iceberg, noting that "a relatively small number of those whose rights were violated were represented before the court" *Ibid.*

But perhaps most striking in the *Lewis* record is the fact that of the 66 highway incidents cataloged by the trial judge, 43, or almost two-thirds, were initiated by an arbitrary stop inspired by neither probable cause nor articulable suspicion of a violation of law. A careful reading of Judge Meanor's 66 separately numbered findings in regard to highway incidents reveals that in no more than 23 was there any-

doubt of the "highly individualized" appearance both in the manner of dress, extensive covering of hair over the face with many and varied bizarre forms of trim and lengthy tresses of hair on the head streaming and curling down the back. Whether deliberately or not, the appearances were, to say the least, "eye catching." The reference in the complaint to the "longhaired travellers" was most apt.

Lewis v. *Kugler*, 324 F.Supp. 1220, 1221-2 (D.N.J. 1971)

thing even remotely resembling cause or suspicion as a reason for the stop. (The opinion of Judge Meanor is not officially reported. It appears in the Appendix to the Petition for Certiorari filed with this Court in *Lewis* v. *Hyland*, No. 77-301, October Term 1977, at 39a, 48a. It is hereinafter referred to as Judge Meanor's Opinion.)[2] Twenty-five of those arbitrary, unprovoked stops resulted in illegal searches, according to Judge Meanor.[3]

The incidents cited from the *Lewis* record demonstrate the far-reaching consequences of a rule which permits police to stop any driver at any time without either a systematic method of choosing targets or an articulable reason to single out a particular target.

[2] The descriptions of the following incidents, as numbered by the trial court, indicate they were unprovoked by any action or inaction on the part of the driver: 1, 2, 3, 5, 6, 7, 8, 9, 10, 12, 14, 15, 17, 18, 20, 23, 24, 26, 27, 28, 29, 31, 32, 33, 34, 35, 38, 39, 40, 45, 47, 48, 49, 54, 55, 58, 59, 60, 62, 63, 64, 65. (Judge Meanor's Opinion, at 52a-120a). A number of the incidents initiated by a "routine" stop for documentary inspection did not result, according to Judge Meanor, in illegal searches either because no search at all took place or because the search was held to be legal, generally on grounds of acquiescence by the driver. On the other hand, some of the 34 illegal searches found by Judge Meanor resulted from perfectly proper stops for traffic or other law violations. The legality or illegality of any ensuing search is, of course, of limited relevance to the instant case, which involves the threshold question of whether arbitrary highway stops by roving police patrols without cause or articulable suspicion are constitutional.

[3] Incidents Number 1, 2, 3, 5, 6, 7, 8, 10, 14, 15, 18, 20, 23, 24, 26, 27, 28, 31, 32, 33, 38, 40, 47, 49, 55. (Judge Meanor's Opinion, at 52a-120a).

These figures are further illuminated by Judge Meanor's finding that in the year 1970, on the New Jersey Turnpike and Garden State Parkway alone, New Jersey State Police were involved in "approximately 545,000" highway incidents in which "summonses or warnings were issued, vehicles other than trucks were inspected, or possible drunk drivers were checked," and that in only about one-half of those incidents (275,000) was a summons actually issued. (Judge Meanor's Opinion at 48a). The opportunity for abuse in police-driver contacts in the absence of strict systematic controls, if not obvious as a matter of common sense or sufficiently documented by general social science research, is *strikingly* illustrated by the *Lewis* record.[4]

---

[4] Judge Meanor denied plaintiffs the injunctive relief they sought because "there was no deliberate pattern and practice of violating Fourth and Fourteenth Amendment rights on the part of the Attorney General, the Superintendent of the New Jersey Police as a whole." Judge Meanor's Opinion at 48a. The Third Circuit affirmed, 554 F.2d 93, based on this Court's Opinion in *Rizzo* v. *Goode*, 423 U.S. 362 (1976).

MOTION FILED
NOV 22 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1571

STATE OF DELAWARE,

Petitioner,

vs.

WILLIAM J. PROUSE, III,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF DELAWARE.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.

FRANK CARRINGTON, ESQ.,
WAYNE W. SCHMIDT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
960 State National Bank,
Evanston, Illinois 60201,

GLEN R. MURPHY, ESQ.,
International Association of Chiefs of Police, Inc.,
Eleven Firstfield Road,
Gaithersburg, Maryland 20760,
Counsel for Amici Curiae.

Of Counsel:
JAMES P. COSTELLO, ESQ.,
JOHN F. FENNIG,
RICHARD J. VITTENSON,
Americans for Effective Law Enforcement, Inc.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

	PAGE
Table of Authorities	ii
Motion for Leave to File a Brief *Amici Curiae*	1
Interest of the *Amici Curiae*	2
Brief *Amici Curiae* in Support of the Petitioner	3
Arguments:	
I. Introduction	3
II. The Mere Potential for Abuse Should Not Render an Otherwise Constitutional Police Practice Invalid	6
III. The Power of the Police to Make Random Stops Has a Very Necessary and Legitimate Deterrent Effect on Potentially Dangerous Motorists	10
Conclusion	12

Table of Authorities.

Cases.

Brown v. Mississippi, 297 U.S. 278 (1936) 7
Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973) 5
Irvine v. California, 347 U.S. 128 (1954) 7
Leonard v. State, 496 S.W.2d 576 (Tex. Crim. App. 1973) 5
Lipton v. United States, 348 F.2d 591 (9th Cir. 1965) 4, 5, 8, 9
Myricks v. United States, 370 F.2d 901 (5th Cir. 1967), cert. denied, 386 U.S. 1015 (1967) 5
Palmore v. United States, 290 A.2d 573 (D.C. App. 1972) 5, 11
People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1976) 5, 6, 7
Screws v. United States, 321 U.S. 91 (1945) 7
State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973) 5
State v. Holmberg, 194 Neb. 337, 231 N.W.2d 672 (1975) 5, 8, 9
State v. Prouse, Del. Sup'r, 382 A.2d 1359 (1978) 5, 6
Terry v. Ohio, 392 U.S. 1 (1968) 7
United States v. Brigoni-Ponce, 422 U.S. 873 (1975) ... 3, 4
United States v. Jenkins, 528 F.2d 713 (10th Cir. 1975) . 4
United States v. Lepinski, 460 F.2d 234 (10th Cir. 1972) 4
United States v. Montgomery, 561 F.2d 875 (D.C. Cir. 1977) 5, 8
United States v. Price, 387 U.S. 787 (1966) 7

Other Authorities.

Barshay, Hyman, as quoted by Ernest van den Haag. "On Deterrence and the Death Penalty," 60 J.Crim.L. 141 (1969) 10
Robert F. Turk, Arthur J. McBay, Page Hudson and Marilyn M. Bullaboy, "Involvement of Alcohol, Carbon Monoxide, and Other Drugs in Traffic Fatalities." In *Alcohol, Drugs and Traffic Safety*, p. 597, *id.* 4
Robert S. Sterling-Smith, "Alcohol, Marijuana and Other Drug Patterns Among Operators Involved in Fatal Motor Accidents." In *Alcohol, Drugs and Traffic Safety*, p. 93. Edited by S. Israelstram and S. Lambert. Toronto: Addiction Research Foundation of Toronto, 1975. 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1571

STATE OF DELAWARE,

Petitioner,

vs.

WILLIAM J. PROUSE, III,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER, AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC. AND THE INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE, INC.

Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc. respectfully move this court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The Deputy Attorney General of the State of Delaware has consented to the filing of this brief by Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc.

The respondent has not responded to our requests for his consent. Accordingly, we are moving this Court directly for leave to file. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc. (AELE) is a national, not-for-profit citizens organization incorporated under the laws of the State of Illinois. As stated in its by-laws the purposes of AELE are:

1. To explore and consider the needs and requirements for the effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness to deal with crime.

The International Association of Chiefs of Police, Inc. (IACP) represents over 5,000 chiefs and top executives of police departments and other law enforcement agencies in all 50 states and in 85 foreign countries. The IACP serves the law enforcement profession and the public interest by advancing the art of police service. Its aims are to foster police cooperation and the exchange of information and experience among police administrators throughout the world, and to encourage adherence of all police officers to high professional standards of performance and conduct.

Our interest in this case arises from the nature of the issue involved—whether the police practice of randomly stopping motorists is violative of the United States Constitution. The resolution of this issue will have a direct and material effect on law enforcement in this country. *Amici* believe that this practice is not unconstitutional; random stops of motorists must be conducted by law enforcement officers in order to deter potentially dangerous motorists and to effectively enforce traffic regulations.

ARGUMENT.

I. Introduction.

This case presents a fundamental constitutional question: whether random traffic stops, made by law enforcement officers in order to determine that state drivers licensing and vehicle registration requirements are complied with, are constitutionally permissible.

This Court has reserved judgment on this specific issue. In *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), this Court held that roving searches for aliens by Border Patrol agents must be based on some articulable suspicion; however, the Court noted that:

> Border Patrol agents have no part in enforcing laws that regulate highway use, and their activities have nothing to do with an inquiry whether motorists and their vehicles are entitled, by virtue of compliance with laws governing highway usage, to be upon the public highways. Our decision thus does not imply that state and local enforcement agencies are without power to conduct such limited stops as are necessary to enforce laws regarding drivers licenses, vehicle registrations, truck weights and similar matters. 422 U.S., at 883 n. 8.[1]

---

1. Mr. Justice Rehnquist went even further in his concurring opinion in *United States* v. *Brignoni-Ponce, supra:*

> [A] strong case may be made for those charged with the enforcement of the laws conditioning the right of vehicular use of

(Footnote continued on next page)

The interests of the state in enforcing highway laws are obvious:

1. Seeing that only those qualified to operate motor vehicles are doing so;
2. Making sure that only those vehicles which are properly registered and are in safe operating condition are allowed to be on the highways;
3. Restraining dangerous drivers, such as those who are intoxicated or under the influence of narcotics;[2] and
4. Apprehending those who are driving stolen motor vehicles.[3]

For these reasons many states permit, by statute or court decision, random stops of motor vehicles by law enforcement officers, and this practice has been upheld by a number of courts.[4] Other courts, however, have held that random traffic stops are constitutionally impermissible.[5]

(Footnote continued from preceding page.)

a highway to likewise stop motorists using highways in order to determine whether they have met the qualifications provided by law for such use. [Citations omitted.] I regard these and similar situations, such as agricultural inspections and highway roadblocks to apprehend known fugitives, as not in any way constitutionally suspect by reason of today's decision. 422 U.S., at 887.

2. In a study of highway accidents in six counties in North Carolina, the authors found that 40.3% of those persons who were killed in automobile accidents had alcohol in their blood. Turk, McBay, Hudson and Bullaboy, "Involvement of Alcohol, Carbon Monoxide, and Other Drugs in Traffic Fatalities," in *Alcohol, Drugs and Traffic Safety* 597 (S. Israelstram and S. Lambert ed. 1975). In another study conducted in the Boston area, the authors found that 46% of those persons who were killed in automobile accidents had alcohol in their blood. Sterling-Smith, "Alcohol, Marijuana and Other Drug Patterns Among Operators Involved in Fatal Motor Accidents," in *Alcohol, Drugs, and Traffic Safety* 93, *id.* Both authors indicated that it was difficult to determine the number of alcohol related, non-fatal accidents due to the difficulty of obtaining blood samples from the drivers involved in those accidents.

3. The FBI Uniform Crime Reports noted that in 1977, there were 968,400 motor vehicle thefts in the United States.

4. *United States* v. *Jenkins*, 528 F.2d 713 (10th Cir. 1975); *United States* v. *Lepinski*, 460 F.2d 234 (10th Cir. 1972); *Lipton*

(Footnote continued on next page)

Most cases in this area arise where the traffic stop escalates into a probable cause situation and an arrest is made for some *other* crime which the officer discovers as a result of the random traffic stop. This is certainly the situation in the instant case; the traffic stop was truly "random." The Supreme Court of Delaware noted that:

> Officer Avena candidly testified that the defendant's car was randomly chosen from other vehicles on the road to be the subject of a license and registration check, and that he regularly made routine stops of motor vehicles when not answering complaints. *State* v. *Prouse*, Del. Supr., 382 A.2d 1359 (1978), at 1361.

It was only *after* the stop that the police officer smelled the marijuana odor and then discovered marijuana in plain view. With regard to the "windfall" nature of the marijuana arrest, the Delaware Supreme Court stated:

> We assume, as all counsel involved herein have, that if the initial detention of defendant was constitutional, all subsequent police acts were also since the marijuana was in the 'plain view' of Officer Avena and as contraband was subject to immediate seizure. *State* v. *Prouse*, *supra*, at 1363 n. 3. (Citations omitted.)

Thus, it is clear that the officer was not using a random traffic stop as a subterfuge to search for narcotics. The issue is, purely and simply, whether the random stop itself was permissible—irrespective of the fact that it led to a narcotics arrest.

(Footnote continued from preceding page.)

v. *United States*, 348 F.2d 591 (9th Cir. 1965); *Myricks* v. *United States*, 370 F.2d 901 (5th Cir. 1967), cert. denied, 386 U.S. 1015 (1967); *State* v. *Allen*, 282 N.C. 503, 194 S.E.2d 9 (1973); *State* v. *Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (1975); *Leonard* v. *State*, 496 S.W.2d 576 (Tex. Crim. App. 1973); *Palmore* v. *United States*, 290 A.2d 573 (D.C. App. 1972).

5. *United States* v. *Montgomery*, 561 F.2d 875 (D.C. Cir. 1977); *Commonwealth* v. *Swanger*, 453 Pa. 107, 307 A.2d 875 (1973); *People* v. *Ingle*, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975).

It is not our purpose in this brief to reiterate the legal arguments made by the State of Delaware regarding the constitutionality of random traffic stops, although we agree with them and wish to associate ourselves with them. We will confine our arguments herein to two points: the fact that the mere *potential* for abuse should not render an otherwise constitutional police practice invalid and the fact that the power of the police to make random traffic stops has a very necessary and legitimate deterrent effect on potentially dangerous motorists.

II. The Mere Potential for Abuse Should Not Render an Otherwise Constitutional Police Practice Invalid.

The Supreme Court of Delaware predicated its decision in this case squarely on the *potential* for abuse which random traffic stops might entail. It recognized the legitimate state interest in keeping the highways reasonably safe; but, it continued:

> [T]he factor which in our opinion makes random stops, absent justifying facts, unreasonable is the inherent arbitrariness of the procedure. The flaw in the process is that absolute discretion is conferred on the police to detain whomever they desire for whatever reason *on the pretense of a documents check stop. Thus an officer prejudiced against a visibly identifiable group could stop a disproportionate number of persons in the group. No discrimination has been shown in the stop under examination here, but the evil of the possibility* of discriminatory stops does exist. If we were to accept the State's position, discriminatory stopping procedures *could* be practical with little or no chance for judicial review. *State* v. *Prouse, supra,* at 1364. (Emphasis supplied.)

Other courts which have held random traffic stops to be constitutionally invalid have expressed similar concerns. For example, the Court of Appeals of the State of New York, in *People* v. *Ingle,* 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975), stated:

> Where the *danger of abuse of discretionary power to intrude upon* personal liberty is greatest, discretion must be limited. 36 N.Y.2d, at 419. (Emphasis supplied.)

We differ with the rationale used by these courts for two reasons. First, on a theoretical level, the argument that, since a given police power *could* be abused, it should therefore be proscribed would, if taken to its logical conclusion, require that we divest law enforcement officers of the power of arrest, and right to search for and seize evidence, as there is tremendous *potential* for abuse of these powers, far more so than in random traffic stop cases.

If we are to have law enforcement in this country we must have law enforcement officers. If these officers are to be able to operate effectively, they must be given certain powers: the power of arrest, the power to make searches and seizures, the right to use force, up to and including deadly force, and the right to "stop and frisk." *Terry* v. *Ohio,* 392 U.S. 1 (1968).

There have, unfortunately, been abuses—sometimes gross and egregious abuses—of these powers. *Screws* v. *United States,* 321 U.S. 91 (1945); *Brown* v. *Mississippi,* 297 U.S. 278 (1936); *Irvine* v. *California,* 347 U.S. 128 (1954); *United States* v. *Price,* 383 U.S. 787 (1966).

No one, however, could seriously argue that, because of such cases, we should strip our law enforcement officers of their power and authority. The authority to make random traffic stops is a *very* minimal intrusion compared with most police powers, and we submit that the *potential* abuse of such authority is no reason to hold it constitutionally impermissible. This is particularly true in the instant case where even the lower court conceded that no discriminatory motive on the part of the police officer was shown.

On a far more practical level, we disagree with the contention that courts would be unable to "police the police" in the random stop area. Certainly the Supreme Court of Nebraska, in its

opinion in *State* v. *Holmberg*, 194 Neb. 337, 231 N.W.2d 672 (Neb. 1975), had no particular qualms or reservations about *its* ability to deal with abusive police conduct:

> We have no hesitancy in saying that if the facts should disclose that the stop is a mere pretext for other reasons, it would be held to be arbitrary and unreasonable and violative of the Fourth Amendment. We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some possible crime unrelated to the requirements of section 60-435, R. R. S. 1943. 194 Neb., at 346.

To the same effect, the U. S. Court of Appeals for the Ninth Circuit, which upheld a random traffic stop in *Lipton* v. *United States*, 348 F.2d 591 (9th Cir. 1965), stated:

> This does not mean that a traffic officer might stop an automobile and ask to see the operator's license as a ruse in an intended search for evidence of some possible crime unrelated to possession of a drivers license. (Citation omitted.) 348 F.2d, at 594.

The courts in this country have always kept a sharp eye out for abusive police practices, and there is absolutely no reason to believe that this vigilance will be attenuated in cases involving random traffic stops.

On the contrary, the random traffic stop cases will probably generate a more intense scrutiny of police practices, should evidence of another crime be detected. *United States* v. *Montgomery*, 561 F.2d 875 (D.C. Cir. 1977, but see the opinion of Wilkey, J., dissenting).

In sum, we do not believe that if this Court sanctions the police procedure of random traffic stops, it will lead to wholesale violations of civil rights or civil liberties. To be sure, those few drivers who happen to be unfortunate enough to be stopped at random and are found to be intoxicated, under the influence of or transporting narcotic drugs, driving stolen vehicles, or involved in some other way in criminal activity which the traffic

stop discloses will feel aggrieved. But it is precisely those people against whom the legitimate state interest in random traffic stops is directed.

The innocent driver will show his papers to the officer and go on his way; it is only the guilty—who should not be on the streets and highways in the first place—who have anything to fear from random traffic stops, provided that such stops are conducted properly. We submit that the minimal interference involved is more than justified by the state's interest in such cases. As the courts have stated with regard to random traffic stops:

> The only practical method of enforcing the licensing laws involved is by stopping the vehicle. *State* v. *Holmberg*, 194 Neb. 337, 341 (1975);

and,

> A contrary holding against random stops would render unenforceable the state statute requiring that automobile drivers be licensed. *Lipton* v. *United States*, *supra*, at 593.

If *potential* abuse of a given police practice, which is supported by a legitimate government interest, is raised by the opponents of that practice, we submit that the burden should be on those opponents to document evidence of such potential abuse. This clearly was not done by the Supreme Court of Delaware which conceded that there was no discriminatory motive in the stop of Respondent Prouse's car. (See above, p. 5).

The bald statement that a police procedure *can* be abused should not be equated with *proof* of such abuse. Our point is simply this: we have conceded that *any* police power can be, and, regrettably, has been, abused. We contend that such abuses, however, are the exception rather than the rule; and we vigorously contend that unless abuses—actual or potential—have been proven to an extent that they outweigh the legitimate needs of the state to protect its citizens, this Court should not invalidate demonstrably necessary police procedures.

III. The Power of the Police to Make Random Traffic Stops Has a Very Necessary and Legitimate Deterrent Effect on Potentially Dangerous Motorists.

Our final argument about the legitimacy of random traffic stops will be brief. We argue that logic and common sense dictate that the mere knowledge that the police are constitutionally empowered to make random stops will be a significant deterrent to *some* incapacitated drivers, especially drunks and those under the influence of narcotics.

We cannot cite any statistics on this issue, primarily because (as in capital punishment cases) the party who is arguing for deterrence is in the unenviable position of attempting to prove a negative. That is to say that those who *are* deterred from doing a given act are, by definition, not those who can be entered into the deterrence side of the satistical equation. Being deterred, people do not commit criminal acts, and therefore we can never know their numbers.

Even so, we submit that, in a given number of cases, motorists who are in no condition to drive and know it will refrain from driving because they will anticipate that they *might* be stopped, albeit randomly, and would then suffer the consequences of a "driving while intoxicated" or "driving under the influence" conviction.

As noted, we cannot *prove* this contention. It is somewhat similar to the "lighthouse" analogy of the poet Hyman Barshay, writing in defense of capital punishment:

> The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships it saves, but we do not tear the lighthouse down.[6]

6. Hyman Barshay, as quoted by Ernest van den Haag, "On Deterrence and the Death Penalty," 60 J. Crim. L. 141 (1969).

We do argue, however, that the potential deterrent to incapacitated motorists, which is inherent in the police authority to make random traffic stops, should be carefully considered by this Court when the constitutionality of the issue is weighed. The corollary is also true; if an incapacitated motorist knows that he is *immune* from a stop, so long as he can "straighten up" sufficiently when he observes a police car, he may be far more willing to take to the road, to the detriment of other motorists.

This point was made by the District of Columbia Court of Appeals, in the context of license and registration stops, in *Palmore* v. *United States*, 290 A.2d 573 (D.C. App. 1972):

> After all, persons who drive in the District without a valid license and registration will not necessarily exhibit conduct or the appearance giving rise to articulable suspicion that they are without proper driving credentials. Thus they would be immune from the 'spot check' to enforce a requirement deemed necessary by Congress for public safety on the District's highways. 290 A.2d, at 582.

When we consider the considerable toll of human lives that drunk drivers take,[7] we believe that the deterrence argument becomes all the more compelling.

7. *Supra* note 2.

CONCLUSION.

The state has a legitimate interest in assuring that its highways are safe. Random traffic stops foster this interest in certain cases. Wholesale abuse of this practice has not been proven, and the mere *potential* for abuse should not invalidate an otherwise legitimate police practice.

For the foregoing reasons, *amici* urge this Court to reverse the judgment of the Supreme Court of the State of Delaware in the instant case.

Respectfully submitted,

FRANK CARRINGTON, ESQ.,
WAYNE W. SCHMIDT, ESQ.,
Americans for Effective Law Enforcement, Inc.,
960 State National Bank,
Evanston, Illinois 60201,

Of Counsel
JAMES P. COSTELLO, ESQ.,
JOHN F. FENNIG,
RICHARD J. VITTENSON,
Americans for Effective Law Enforcement, Inc.

GLEN R. MURPHY, ESQ.,
International Association of Chiefs of Police, Inc.,
Eleven Firstfield Road,
Gaithersburg, Maryland 20760,
Counsel for Amici Curiae.